92-199

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1991

IRENE ROBBINS AND BERT SHEPHERD, TRUSTEES OF THE DAVIS ROBBINS FAMILY TRUST, AND THE DAVIS ROBBINS MARITAL TRUST, PETITIONERS,

VS.

PAINEWEBBER INCORPORATED, JOHN DAY, JERRY PAYNE, DAVID EAST AND DAVID ARNOLD, RESPONDENTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

Robert B. Eubank
15 Office Park Circle, S. 203
Birmingham, Alabama 35223
205/324-9217

QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may review an arbitration award and arbitration record to determine whether a statutory cause of action has been heard in arbitration.

2. Whether a court of appeals can review a district court finding of fact *de novo*.

3. Whether manifest disregard of the law is grounds for vacating a securities arbitration.

4. Whether arbitrators may refuse to allow plaintiffs to question defendants who obtained an order for arbitration.

TABLE OF CONTENTS

Questions Presented	i
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Basis for Federal Jurisdiction Below	18
Reasons for Granting the Writ	18
I. The Court Should Grant The Writ To Establish That Judicial Review Is Sufficient To Ensure That Arbitrations Recognize Statutory Claims.	19
II. The Court Should Grant The Writ To Resolve The Conflict Among Circuits As To The Standard Of Review On Appeal Of A District Court's Disposition Of An Arbitration Award.	27
III. The Court Should Grant The Writ To Resolve The Conflict Among Circuits As To Vacation Of Arbitrations For "Manifest Disregard Of The Law."	28
IV. The Court Should Grant The Writ To Ensure Fair Arbitration Hearings.	28
Conclusion	29
Appendices:	
Robbins, et al. v. Painewebber Inc., et al., 761 F.Supp. 773 (N.D.Ala. 1991)	Appendix A
Robbins, et al. v. Day, et al., 954 F.2d 679 (11th Cir. 1992), 1991-1992 CCH Sec.L.Rep. Par. 96,523 and Denial of Petition for Rehearing	Appendix B
NASD Award, In Re: Robbins, et al. v	

Day, et al., No. 89-01751 — Appendix C

NASD Award, In re: Robbins, et al. v. PaineWebber, Inc., et al., No. 89-01737 — Appendix D

Report of Charges, and Decision and Order of Acceptance of Offer of Settlement, Amended Complaint, NASD Case No.. C05910051, *NASD v. Painewebber Inc., et al.* — Appendix E

Letter, November 29, 1990, PaineWebber's counsel to NASD, acknowledging engagement of counsel — Appendix F

Opinion and Order, Nelson, J., *Robbins, et al. v. Vickers, et al.*, U.S.D.C. N.D.Ala. No. 89-N-0613-S (4/9/90) — Appendix G

Constitutional Provisions, Statutes and Regulations — Appendix H

Comparative State Securities Act Provisions — Appendix I

TABLE OF ILLUSTRATIONS

Fig. 1: Block Execution Wire
(Trustees' Arbitration Exhibit MT-WT-1, #24) 11

Fig. 2: Closing Quote
(Trustees' Arbitration Exhibit MT-WT-1, #24) 11

Fig. 3: Customer Allocation Ticket
(Trustees' Arbitration Exhibit MT-WT-1, #24) 12

Fig. 4: Customer Allocation Wire
(Trustees' Arbitration Exhibit MT-WT-1, #24) 12

Fig. 5: Day's S&P 100 Block Desk Buys
(Trustees' Arbitration Exhibit D-2) 14-15

Fig. 6: East's Checks To Day
(Trustees' Arbitration Exhibits BF-33, BF-54, BF-77) 16

Fig. 7: First Cashier's Check Financing
(from Trustees' Arbitration Exhibit BF-2, BF-3, BF-7) 17

TABLE OF AUTHORITIES

Cases:

Advest, Inc. v. McCarthy, 914 F.2d 6 (1st Cir. 1990) 28

Ainsworth v. *Skurnick*, 909 F.2nd 456 (11th Cir. 1990) 4

Anaconda Co. v. District Lodge No. 27 of the International Association of Machinists and Aerospace Workers, AFL-CIO, 693 F.2d 35 (6th Cir.1982) 28

Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co., 918 F.2d 1215 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991) 27

Banton v. Hackney, 557 So.2d 807 (Ala. 1989) 25

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988) 4

Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481 (9th Cir. 1991) 27

Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017 (5th Cir. 1990) 27

Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991) 2, 22

In re: Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) 29

Independent Employees' Union of Hillshire Farm Co v. Hillshire Farm Co., 826 F.2d 530 (7th Cir. 1987) 27

Kane v. *Shearson Lehman Hutton, Inc.*, 916 F.2nd 643 (11th Cir. 1990) 4

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) 20

Northrop Corp. v. Triad International Marketing S.A., 811 F.2d 1265 (9th Cir. 1987) 28

O. R. Securities, Inc. v. Professional Planning Associates, Inc.,
857 F.2d 742 (11th Cir. 1988) 4

Pagel, Inc. v. S. E. C., 803 F.2d 942 (8th. Cir. 1986) 29

Pullman-Standard v. Swint,
456 U.S. 273, 72 L.Ed.2d 66, 102 S.Ct. 1781 (1982) 27

Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al.,
903 F.2d 1410 (11th Cir. 1990) 4

Robbins, et al. v. PaineWebber, et al.,
761 F.Supp. 773 (N.D.Ala. 1991), 954 F.2d 679
(11th Cir. 1992), 1991-1992 CCH Sec.L.Rep. Par. 96,523 1

Robbins, et al. v. Thomson McKinnon Securities, Inc., et al.,
1991 CCH Sec. Law Rep. Par. 96,031
(U.S.D.C. N.D.Ala. 1991), *affirmed*
No. 91-7535 (11th Cir. 6/17/92) (unpublished) 9

Rodriguez de Quijas v. Shearson/American Express, Inc.,
490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) 21

Shearson/American Express, Inc. v. McMahon,
482 U. S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185,
reh. den., 483 U.S. 1056, 108 S.Ct. 31,
97 L.Ed.2d 819 (1987) 2, 20

Siegel v. Titan Indus. Corp.,
779 F.2d 891 (2d Cir. 1985) 28

Stroh Container Co. v. Delphi Industries, Inc.,
783 F.2d 743 (8th Cir. 1986) 28

United States v. Mammoth Oil Co.,
14 F.2d 705 (8th Cir. 1926),
aff'd 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927) 29

Wilko v. Swan, 346 U.S. 427, 98 L.Ed. 168,
74 S.Ct. 182 (1953) 19, 28

Statutes:

9 U.S.C. §10(c) 4

Alabama Securities Act §17(a)
[Code of Alabama, §8-6-17(a)] 23

Alabama Securities Act §19(a)(2)
[Code of Alabama, §8-6-19(a)(2)] 24

Alabama Securities Act §19(c)
[Code of Alabama, §8-6-19(c)] 26

Securities Act of 1933, §12(2) [15 U.S.C. §77l(2)] 24

Securities Act of 1933, §15 [15 U.S.C. §77o] 26

Securities Act of 1933, §17(a) [15 U.S.C. §77q(a)] 23

Securities Exchange Act of 1934, §20(a) [15 U.S.C. §78t(a)] 26

Securities Exchange Act of 1934, §20 [15 U.S.C. §78cc(a)] 26

SEC Rule 10b-5 23

18 U.S.C. §1961 25

18 U.S.C. §1962 25

18 U.S.C. §1964 25

Other Authorities:

NASD Arbitration Rules, Sec. 16 7

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding.

OPINIONS BELOW

The District Court's opinion appears as *Robbins, et al. v. PaineWebber Inc., et al.*, 761 F.Supp. 773 (1991); Appendix A reproduces it. Judgment has not yet been entered in District Court. The Court of Appeals' opinion appears, restyled, as *Robbins, et al. v. Day, et al.*, 1991-92 CCH Sec L.Rep. Par. 96,523, and in revised form at 954 F.2d 679 (11th Cir. 1992); Appendix B reproduces it and notes the revisions.

JURISDICTION

The judgment below was rendered and entered February 27, 1992 by the Court of Appeals for the Eleventh Circuit. A petition for rehearing was denied on April 30, 1992 (Appendix B, p. B-12). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Alabama Securities Act, §§8-6-17, 8-6-19(a), -(c), -(h) [Uniform Securities Act §§101, 410(a), -(c), -(h)]
Constitution of the United States, Amendment V
Federal Arbitration Act, §10 [9 U. S. C. §10]
Racketeer Influenced and Corrupt Organizations Act, 18 U. S. C. §§1961, 1962, 1964
Securities Act of 1933, §§12(2), 14, 15, 17(a), 18 [15 U.S.C. §§77l(2), 77n, 77o, 77q(a), 77r]
Securities Exchange Act of 1934, §§10(b), 20(a), 28(a), 29(a) [15 U.S.C. §§78j(b), 78t(a), 78bb(a), 78cc(a)]
SEC Rule 10b-5

Pursuant to United States Supreme Court Rule 14.1(f) the above are set forth verbatim at Appendix H.

STATEMENT OF THE CASE

> "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute," *Shearson American Express v. McMahon*, 482 U.S. 220, 232, 107 S.Ct. 2332, 2340, 96 L.Ed.2d 185 (1987); *Gilmer v. Interstate Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647, 1655 n. 4, 114 L.Ed.2d 26 (1991)

This petition concerns the extent to which securities industry arbitrators may ignore statutory claims, and the extent to which the courts may inquire whether they ignored them.

The Claims. The case is colorful. Trustees assert that Birmingham PaineWebber broker Day during December 17, 1987 - March 2, 1988 purchased several million dollars of options (primarily Standard & Poor's 100 index options, or "S&P 100's")[1] without naming the customer. He sold those that went up that day and then gave himself and fellow brokers East and Arnold the profits. He charged whatever was left to Trustees, to the knowledge of branch manager Payne but not Trustees. (Day, Payne, East and Arnold are the "Brokers," and together with PaineWebber, the "PaineWebber Defendants.") Trustees never placed an order to buy an option. Their accounts were not "discretionary accounts," that is, Day had no legal authority to execute trades in the accounts without orders from Trustees. Additionally Trustees asserted consequential lesser offenses, such as "churning" (purchasing excessive amounts of securities); purchasing securities that were "unsuitable" for two septuagenarian trustees of testamentary trusts (namely, several million dollars of index and other options); and charging options "buys" to them without authorization or notice.

In arbitration Trustees specifically stated statutory claims under Alabama's Uniform Securities Act ("Uniform Act"); the federal Securities Exchange Act of 1934 ("'34 Act") and Rule 10b-5; and

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[1] The characteristics of S&P 100's would write a book, some other time. All that matters for present purposes is: first, they are "volatile" - i.e., they can easily triple or go down by 2/3 in a day or an hour; and second, they expire (disappear, become worthless) the third Friday of each month.

the Racketeer Influenced and Corrupt Organizations Act ("RICO"); common-law claims of fraud, negligence, conversion of funds and breach of fiduciary duty; and (individually) in tort for mental anguish, pain and suffering. They attached the statutes as exhibits to their claim, underscoring the applicable provisions. All three arbitrators were licensed to practice law in Georgia, which has the same Uniform Securities Act as Alabama. The district court's order directed determination of all stated claims, specifically including RICO as its arbitrability had been disputed. It is inconceivable that the arbitrators were unaware of the statutory claims.

The same claims against another group of defendants, not subject to arbitration, remain for trial below. They are Arnold's customers Owen Vickers, Harvey Gotlieb, Birmingham Hide and Tallow Company and Alabama Grease Products Company (the "Vickers Defendants"). Trustees claim the Vickers Defendants knowingly furnished some $563,000 in cashier's checks, needed on a morning's notice to finance the fraud.

The district court ordered the arbitration in June 1989 at the PaineWebber Defendants' motion over Trustees' opposition. Though in January 1991 Trustees finally "won" the arbitration, the arbitrators awarded only about 25¢ on the dollar of their losses ($325,000 against an agreed $1,148,600 actual options losses plus some $25,000 margin interest), and explicitly refused attorney fees and interest. Full rescission damages and interest (as will be seen) are mandatory under the federal Securities Act of 1933 ("'33 Act") and the Uniform Act, and the latter requires court costs and attorney's fees as well. The arbitrators also declined to award RICO treble damages and attorney fees. Finally, the arbitrators on their own motion dismissed all claims against East, Arnold and Payne. So, ironically, the PaineWebber Defendants moved to confirm the arbitration they "lost" and Trustees moved to vacate or modify what they "won." The district court vacated.

The District Court Opinion. After thorough briefing over several months, and reviewing the arbitration record for some 17 days, the district court in April 1991 vacated for two basic reasons. First, the arbitrators allowed the Brokers (of whom the Alabama

Securities Commission, or "ASC," had obtained criminal indictments) to plead a "blanket Fifth," refusing to let Trustees question them and giving them the Fifth Amendment privileges of a criminal defendant at his own criminal trial. This the court found doubly offensive: the Brokers did not have to plead to specific questions; and before indictment they had given extensive depositions on the subject matter of the dispute and waived the Fifth (Appendix A, pp. 4-6). This was a refusal to hear pertinent and material evidence under Federal Arbitration Act, 9 U.S.C. §10(c) - grounds for vacation. Second, the district court found the arbitrators avoided statutory claims in "manifest disregard of the law." It made a factual finding from the arbitration record (even absent the Brokers' testimony) that any conclusion less than fraud would be "totally arbitrary, capricious and irrational" (Appendix A, p. 7 n. 5). It followed therefore that the award was in "manifest disregard" of the Uniform Act the explicit refusal of attorney's fees being a clear example. The court also found "manifest disregard" of RICO, as its damages were not awarded (Appendix A, pp. 7-8).[2]

The Eleventh Circuit Opinion. The Eleventh Circuit, on the PaineWebber Defendants' appeal, adopted a new, split standard of review - *de novo* where arbitrations are vacated, only for abuse of discretion where they are confirmed.[3] From its opinion however it

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[2] As will be seen, the district court could have added that another judge of the district had already ruled, before the arbitration, that the Brokers had waived the Fifth and could not take a blanket Fifth anyway; and further, that both sides, their expert witnesses and the panel had acknowledged the amount of full-rescission statutory damages - $1,148,600 (plus margin interest). The Court should remember the district court opinion was an interlocutory order written when the standard of review was "abuse of discretion;" otherwise it might have been considerably more detailed.

[3] Heretofore the standard of review had been for abuse of discretion, regardless of the outcome below. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir. 1990); *O. R. Securities, Inc. v. Professional Planning Associates, Inc.*,, 857 F.2d 742 (11th Cir. 1988); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988). The Eleventh Circuit had affirmed vacation of an arbitration award and entry of mandatory full-rescission damages plus interest under the Florida's Uniform Securities Act (which does not require attorney fees), *Ainsworth v. Skurnick*, 909 F.2d 456 (11th Cir. 1990); *Kane v. Shearson Lehman Hutton, Inc.* 916 F.2d 643 (11th

does not seem to have actually reviewed the arbitration record, and largely confuses the PaineWebber Arbitration (NASD No. 89-01737, Appendix D) with another (the "Thomson McKinnon Arbitration," NASD No. 89-01751, Appendix C, arising from Day's handling of Trustees' accounts at his previous firm, *infra*) that was also then on appeal.[4] It refused the doctrine, prevalent in other circuits, that an arbitration may be vacated for "manifest disregard of the law" (Appendix B, p. 8). But, strictly speaking, it never contradicted the district court's holding that the arbitration record compelled a finding of fraud and anything less would be "arbitrary, capricious and irrational." As for the Fifth Amendment issues, the

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Cir. 1990). Both these cases were decided under the former standard of review, though not explicitly reciting it.

[4] The opinion describes the Thomson McKinnon Arbitration award:

"The Trustees originally sought $4,200,000.00 in actual damages, $12,000,000.00 in punitive damages, $12,600,000.00 in RICO damages, attorney's fees, costs, and expenses totalling over $26,800,000.00 in damages ... The NASD Award "Case Summary" stated that the Brokers answered the Trustees' allegations by claiming that (1) the Trustees were aware of all trading activities; (2) the Accounts were handled in accordance with the Trustees' express instructions; (3) prior to the initiation of the lawsuit the Trustees never expressed any dissatisfaction with the Brokers' handling of the Accounts; and (4) the losses of the Accounts were due to the market break of October 19, 1987, when the equity investments in both accounts declined substantially." Appendix B, p. 3.

All these statements are untrue and paraphrase almost verbatim the Thomson McKinnon award. In the PaineWebber Arbitration the compensatory damages requested were $1,500,000; the punitive damages, $10,000,000. Defendants did not claim Trustees never expressed any dissatisfaction before filing suit - admittedly Trustees telephoned, wrote protesting letters, and sent counsel to PaineWebber twice to order the trading stopped. They did not blame the losses on the "market break of October 19, 1987" - the accounts were not opened until November 1987. The opinion stated that "even before the filing of the arbitration transcript, the district court ... entered an order vacating the arbitration award ...", which it later corrected to reflect that the district court ***had*** reviewed the record (Appendix B, p. 3). The initial statement implies no review even of the district court docket sheet before deciding the appeal. The opinion says Trustees accused the Brokers of "preferentially allocating ***funds***" (Appendix B, p. 2); the allegation was, preferential allocation of ***options buys***. "Funds" do not change enough in value to be "preferentially allocated."

opinion construed the situation as one in which the arbitrators would have refused to proceed, had not Trustees "represented" that the Brokers' testimony was "unimportant" and that they had the right to plead the Fifth (Appendix B, pp. 9-10). It never addressed, at all, whether the Brokers had waived the Fifth.

Prior District Court Fifth Amendment Ruling. Before the arbitration began, on April 9, 1990 Nelson, J. had already ruled the Brokers had waived the Fifth as to matters upon which they were previously deposed, and that as to other matters they could not plead a "blanket Fifth:"[5]

> "The Fifth Amendment privilege against compulsory self-incrimination must be claimed with respect to particular questions. A ***blanket refusal to answer all questions is unacceptable because it forces the reviewing court to speculate as to which questions would tend to incriminate the witness***. *Anglada v. Sprague*, 822 F.2d 1035 (11th Cir. 1987). The plaintiffs will be allowed to depose Arnold and East, and ***they may claim the protection of the Fifth Amendment only as to questions which would tend to incriminate them and the subjects of which were not***

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5 This came about as follows. Trustees had first filed suit before Guin, J. against PaineWebber, Day and Payne ("PaineWebber Suit"); then, after depositions of Day, East, Arnold and Payne, before Nelson, J. against Arnold, East and the Vickers Defendants ("Vickers Suit"). The PaineWebber defendants moved to seal the record, but the court ordered Trustees could furnish it to appropriate authorities, including the Securities and Exchange Commission ("SEC") and the ASC. Trustees did so.

In January 1990 the ASC, assisted by the SEC, obtained its indictments of the Brokers for violations of the Alabama Securities Act. PaineWebber, having already engaged attorneys to represent the Brokers civilly, now retained criminal attorneys for them as well (Appendix F, p. 3, par. 3). Meanwhile in the Vickers Case Trustees noticed further depositions of Day, East, and Arnold, who moved to quash and stay pleading the Fifth - thus, Nelson's ruling. Trustees never took the depositions, as by that time arbitration hearings were impending and Trustees anticipated getting the testimony there.

As to the extent of the waiver, the Brokers' depositions (Arb. Exhs. C2-63 - C2-66) covered virtually every transaction in the Brokers' accounts and Day's manner of trading both Brokers' and Trustees' accounts.

waived in the prior depositions." Appendix G, p. 3.

He subsequently made the same ruling as to Day.

The Arbitration. Meanwhile the PaineWebber Defendants moved to postpone the NASD arbitration indefinitely, claiming that they had "the right under the Fifth Amendment ... to decline to testify." Trustees opposed postponement, noting that

> "[i]n any event, the criminal defendants have waived their Fifth Amendment privileges ... and testified extensively in depositions even though Trustees at all times made clear their intention to report the matter to the SEC and ASC, and had court orders so allowing."

They furnished a copy of Nelson, J.'s opinion to the NASD on April 18, 1990. Trustees also noted that they were in their late 70's; that the arbitration was already almost a year old; and that PaineWebber had the resources to delay a criminal trial indefinitely. (As in fact it has - there has as yet been no criminal trial, some 16 petitions for writs of mandamus and various motions having forestalled it.) The NASD initially postponed but ultimately began hearings in July 1990. On the first day the PaineWebber Defendants threatened to refuse to testify beyond giving their names and addresses (TR 24).[6] The arbitrators refused to reconvene before October 1990, at which time Trustees sought to question the Brokers.[7] The arbitrators then, for the first time, granted them a "blanket Fifth," refusing to allow Trustees to question them (TR 1060). Trustees moved under the NASD's Rule 16[8] to remand the case to district court, but this was denied (TR 1061), the arbitrators

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6 Transcript references are to the arbitration transcript. There are no district court transcripts, as there has been no trial.

7 They also sought to question the Vickers Defendants, upon whom they served arbitration subpoenas which the Vickers Defendants ignored. The NASD refused to hold hearings any closer to Birmingham than Atlanta (about 150 miles distant), so Trustees could not enforce the subpoenas.

8 "**Sec. 16.** At any time during the course of an arbitration, the arbitrators may, either upon their own initiative or at the request of a party, dismiss the proceedings and refer the parties to the remedies provided by applicable law."

however offering to postpone all proceedings indefinitely (TR 1047). Upon reconvening in December 1990 Trustees introduced deposition testimony of the recalcitrant defendants, and then moved to question them on the grounds they had waived the Fifth (TR 1052). The arbitrators refused (TR 1054). Trustees themselves then moved to postpone until after a criminal trial, but the arbitrators refused (TR 1054). The arbitrators on their own motion dismissed all claims against East, Arnold and Payne. In January 1991 they rendered the award that was subsequently vacated.

The NASD Charges. Meanwhile, ironically, the NASD itself contacted Trustees' counsel requesting the district court discovery and arbitration record. On April 29, 1991 the NASD charged the PaineWebber Defendants with the very offenses Trustees claimed.[9] A year later the PaineWebber Defendants agreed to a $75,000 fine and censure for PaineWebber; a $100,000 fine, censure and bar from the industry for Day; a $10,000 fine and censure for Payne; a $5,000 fine, suspension and censure for Arnold; and a $15,000 fine and censure for East (Appendix E, p. 14).

Factual Background and Documentary Evidence

It is problematical to deal with the record in a petition for certiorari - especially when Trustees contend that the court of ap-

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[9] The NASD refused Trustees' counsel copies of the charges, but under the Alabama Securities Act the PaineWebber Defendants themselves had to report the charges to the Alabama Securities Commission, which in turn is done *via* the NASD's Central Registration Depository computer. The report in turn was public record. Trustees' counsel obtained it (Appendix E, p. 1). In addition to reciting the lesser churning and unsuitability, etc. claims, it recited:

" ... RESPONDENT DAY, ASSISTED BY RESPONDENTS ARNOLD AND EAST, ENGAGED IN A SCHEME TO DEFRAUD THE SAME PUBLIC CUSTOMER ACCOUNTS IN THAT HE EXECUTED BLOCK PURCHASES OF OPTIONS THAT WERE FINANCED BY PERSONAL LOANS FROM TWO PUBLIC CUSTOMERS [i.e., the Vickers Defendants] AND ALLOCATED PROFITABLE TRANSACTIONS TO THEIR [i.e., the Brokers'] PERSONAL ACCOUNTS WHILE ALLOCATING THE UNPROFITABLE TRANSACTIONS TO THE ACCOUNTS OF THE CUSTOMER [i.e., Trustees] ..."

peals erred gravely in purporting to enmesh *itself* in factual matters. The district court however went straight to the ultimate finding of fact - fraud - with little detail along the way; and the Court should have confidence that there was extensive evidence in support of its emphatic factual findings.

Trustees and the Loss. Ms. Robbins and Mr. Shepherd are 79, with grammar and high school educations, respectively, living in Oneonta, Alabama. They are trustees of the usual Marital and Family Trusts under Ms. Robbins's husband's will. In 1987 the trusts had two brokerage accounts at Thomson McKinnon in Birmingham; Day was their stockbroker. He had churned the accounts for years, but they had not understood this.[10] In November 1987 Day went to PaineWebber and Trustees followed him. By March 1988 he had charged options to the trusts that lost them some $1,148,600, as PaineWebber's expert witness, the arbitrators and opposing counsel agreed:

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[10] Trustees admitted that Day had thoroughly ingratiated himself with them. But, as Hamlet observed, "one may smile, and smile, and be a villain." After the PaineWebber Defendants unwisely raised Trustees' prior satisfaction with Day as a defense, Trustees had the Thomson McKinnon accounts reviewed. As a result, in 1989 they sued Thomson McKinnon, John Day and Roland Day (his branch manager and father). The "Thomson McKinnon Arbitration," from which Thomson escaped when it filed bankruptcy, awarded for Trustees. *Robbins, et al. v. Thomson McKinnon, Securities, Inc., et al.*, 1991 CCH Sec. Law Rep. Par. 96,031 (N.D.Ala. 1991) (adding attorney's fees to comply with the Uniform Act), affirmed 11th Cir. No. 91-7535 (6/17/92) (unpublished).

Option	Trustees	PaineWebber[11]	Diff.
Amex Major Market Index	$6,120.81	$6,120.81	
Standard & Poor's 100 Index	($1,100,328.23)	($1,100,328.26)	($0.03)
Stock Options	($54,392.03)	($54,392.03)	
Total Losses:	***($1,148,599.45)***	***($1,148,599.48)***	***($0.03)***

A *full statutory rescission* would restore $1,148,599.45 (ignoring the disputed 3¢), plus another $25,000 or so in margin interest as Day had charged the options to Trustees on the margin.

Documentary Evidence. Beginning December 17, 1987 Day made "buys" through the "block desk," which does not require naming the customer until after the day's results were known and even after the "winners" if any had been sold and their profits taken. Until the two senior branch brokers ("Richardson" and "Rowe") reported them to the branch manager February 2, 1988, every time the options went up Day sold them the same day (this is called a "day-trade"). Then the profits were "allocated" to his account, East's or Arnold's. Otherwise he charged the options to Trustees, often as not after the market closed.

The documentary evidence included Trustees' and the Brokers' statements; the Brokers' and the Vickers' Defendants' checks and deposit slips (obtained from banks); PaineWebber "block execution wires," "customer allocation tickets" and "customer allocation wires;" Wall Street Journal S&P 100 closing quotes; and

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11 PaineWebber's expert's report, Exh. R-6 §§A4.0, B4.0. Its author, PaineWebber expert witness Ron Kessick, at TR 2434 also so testified: ***"Q. ... The total losses on options plus the margin interest would be something in the neighborhood of $1,148,000 plus another $12,000 or so? A. Yes, sir." Opposing counsel and the panel agreed with the $1,148,000 figure at TR 2433: "[Day's counsel]: Isn't it $1,148,000?" [Arbitrator Gulden]: "Right, that's what I got." [Witness Kessick]: "Yes."***

It may seem odd that Trustees disavowed the minor profits in "Amex Major Market Index" options. But their contention should be recalled, that ***any*** options purchases were unsuitable for them. It was a question of consistency.

demonstrative summary exhibits. Establishing the buy and sell times and prices, and daily profits and losses is tedious but not complex. Day's first block desk buy (20 S&P 100's charged to the Marital Trust December 17) is as good an example as any.

Brokerage firms are required by law to keep extensive records of the times and terms of transactions. For every "buy" or "sell" there was a "*block execution wire*." (Fig. 1),[12] reciting the purchase (but no customer) and the date and time in the format "121787/1048" - for "12/17/87", "10:48 a.m." (all times EST).

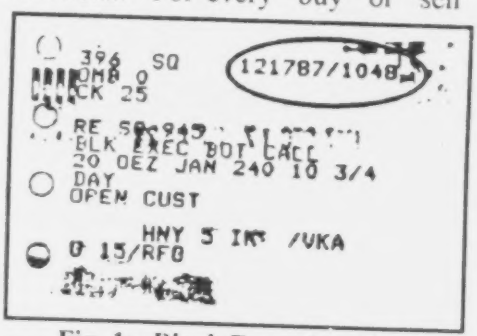

Fig. 1: *Block Execution Wire*

The Wall Street Journal's *closing quotes* (Fig. 2), and eventual purchase cost charges on customer statements, established Trustees' closing losses. Continuing the example, these options fell from 10 3/4 to 8 or $16,000, a loss of $5,733 from the $21,733 ultimately charged to Trustees on their statement. Day had instant computer quotes.

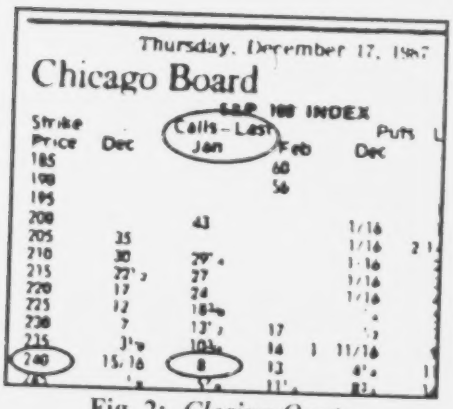

Fig. 2: *Closing Quote*

Day turned in order tickets, the "*customer allocation ticket*" (Fig. 3), naming a customer account number.[13] The number ("SQ17994", cir-

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12 Trustees' arbitration Exhibit MT-WT-1, #24, for [M]arital [T]rust [W]ires and [T]ickets, [24]th trade on its statements. All statements, confirmations, wires, tickets and closing quotes for Trustees and the Brokers were exhibits. The Table of Illustrations cross-references the exhibits in this petition.

13 This order ticket is the crux of the whole matter. In a normal trade it has to be turned in first to make the order, with the customer's number already filled in. So there is no chance for a broker to take the winners and give a

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cled) is the Marital Trust's. The wire operator time stamped them - here, "1987 DEC 17 PM 4:21," *after* the $5,733 drop - the Chicago Board Options Exchange ("CBOE") closes at 4:15 p.m. EST.

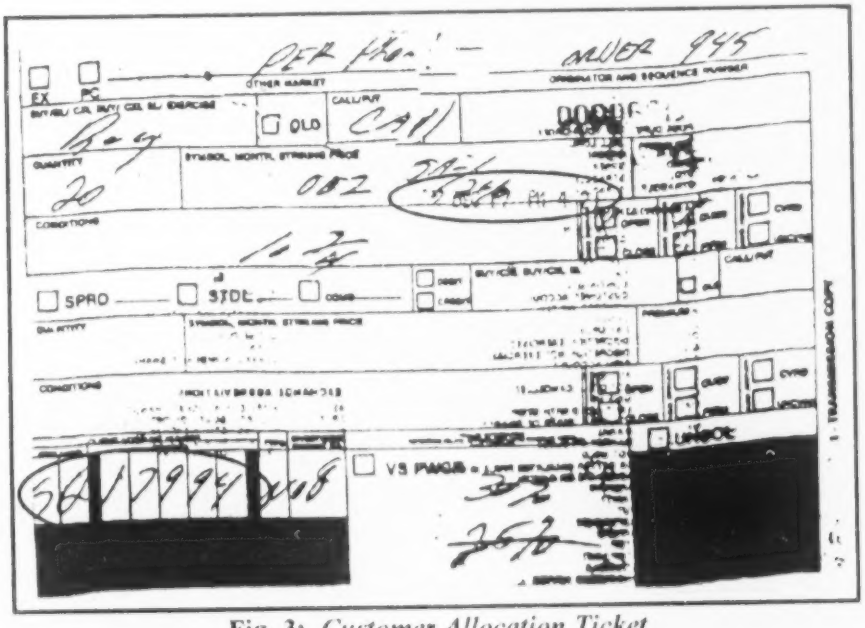

Fig. 3: *Customer Allocation Ticket*

Shortly New York sent wires back confirming the allocation - the "*customer allocation wire*" (Fig. 4), in this example at "121787/1622," 4:22 p.m. Now a customer appears - the Marital Trust (also circled).

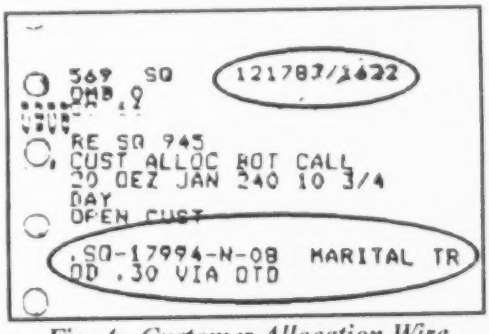

Fig. 4: *Customer Allocation Wire*

Thus the times of the buys and sells, closing losses to Trustees, same-day profits to Brokers, and the times Trustees and Brokers became the customer could be established. These examples were from trade "Marital-24" - the 24th transaction on the Marital

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customer the losers. A block desk trade however is like being able to pick the horse after the race, or bet on last night's football game.

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Trust's statements. When the options went up Day sold them and *then* allocated the profits to himself, East or Arnold.

This information was summarized on several arbitration exhibits, which the district court also had before it. Perhaps the most comprehensive was Trustees' arbitration Exhibit D-2 (Fig. 5, next two pages), which summarized the daily profits, losses and allocations of *all* of John Day's 96 block desk S&P 100 buys from December 17, 1987 to March 2, 1988. PaineWebber stipulated its accuracy at arbitration (TR 285, 712-5, 997).

The "Marital-24" buy is at the far left, with "M24" at top. The black bar at bottom extends from 10:48 a.m. (block execution wire, on time scale at right) upward to 4:21 p.m. (customer allocation ticket or customer allocation wire), for a 5 hour 33 minute delay. Above that a white, heavily bordered bar extends downward for the $5,733 loss for the day at the close (dollar scale at left). Though this particular exhibit doesn't show it, other exhibits and the Brokers' statements showed that until Richardson and Rowe complained on February 2, the Brokers' profits were all sold out the same day, then allocated to them; these appear as patterned bars at top.[14] Behind each black "delay" bar are times on the wires and tickets; behind each white or patterned "profit/loss" bar are the statements and (if not sold that day) closing quotes.[15]

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[14] Except the three designated "McKell," a customer who received two profits of some $10,000 and then a $10,000 loss, for unknown reasons.

[15] Trustees did not stand idly by. In December Mr. Shepherd, having received confirmations of early index options charges, called Day and told him to stop buying them (TR. 1791 - "do not touch the S&P 100's."). He telephoned throughout January but Day wouldn't take or return calls (TR 1771-1776). In late January he finally got Day, who said he would come to Oneonta to explain. But then Richardson and Rowe complained to Payne and then a regional manager, resulting in the records being sent to New York. Day went to Brazil. Mr. Shepherd wrote two letters in early February (Exhs. 41, 43) protesting the trades. When Day returned in mid-February he nevertheless began charging options to Trustees again. They consulted counsel and sent him to PaineWebber twice in late February to order the trades stopped, but they continued until early March..

S&P 100 Block Desk Purchases
Family & Marital Trusts, Day, East, Arnold & McKell
Gains & Losses at Market Close, & Delays Before Naming Customers

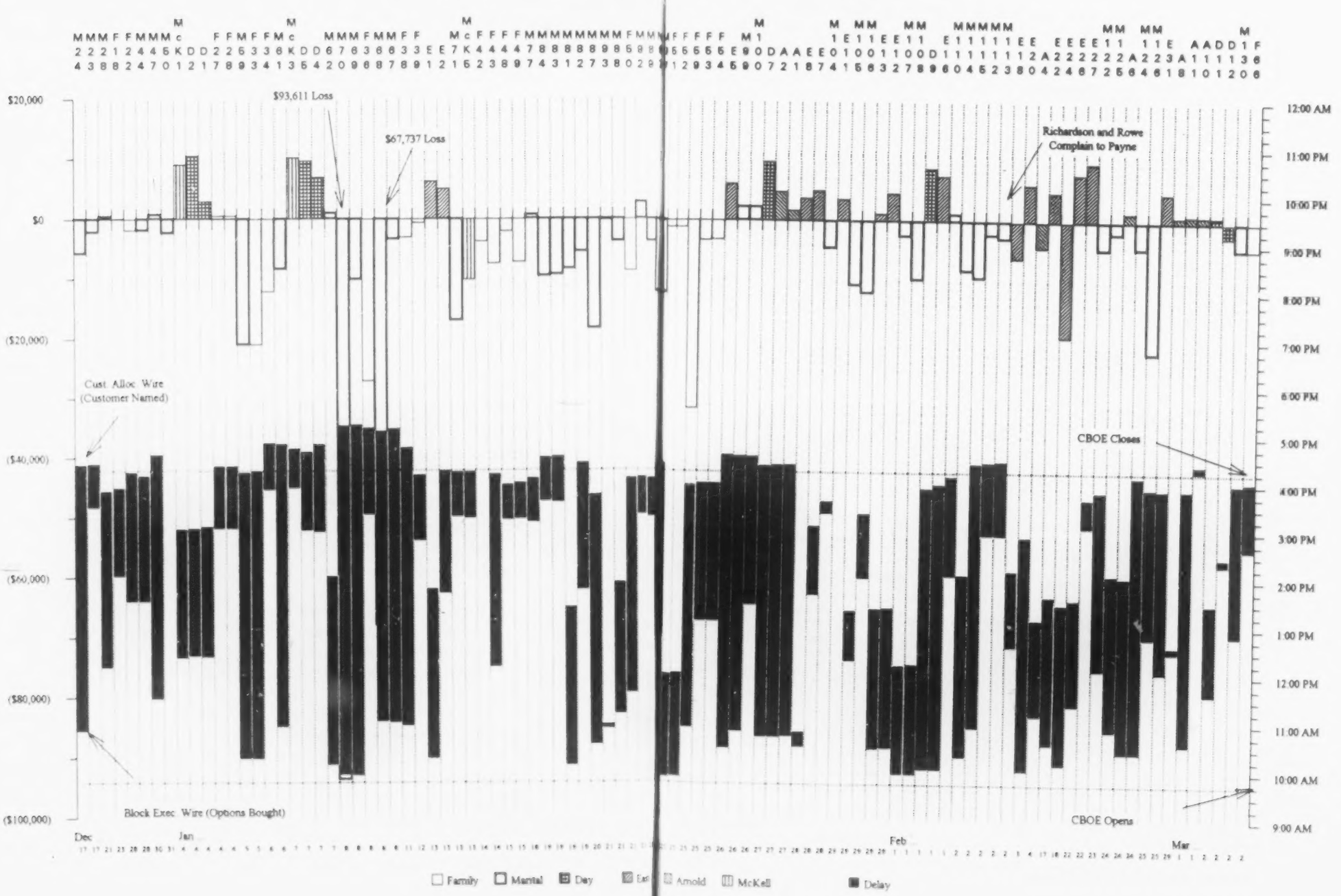

Fig. 5: Pattern of Broker Profits and Customer Losses

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Without going into every detail, the chart shows that until the two senior brokers reported the matter February 2, every time the options went up sharply Day sold them and put the profits in the brokers' accounts - 17 straight times. The odds against 17 straight profits, given that securities go down as often as up the days they are bought, are the same as those against flipping a coin "heads" 17 straight times - 2^{17}, or 130,072, to 1. Probably worse, as some options will break about even; and Trustees were charged for these too. As for Trustees, for example, on one day alone - January 8 - they were charged an hour after market close for S&P 100's that had already gone down some $200,000. The same broker trading the same options during the same period of time, produced only profits for the Brokers and the exact opposite for Trustees.

East's Splits With Day. East split his profits by secretly giving Day checks for 50% of them January 15 and 29 and February 5 (Fig. 6). For example, the first check ($5,608.81, rounded to the penny) split profits of $6,233.94 and $4,983.69, or $11,217.63 in all, that Day put in East's account on January 13 ("E1" and "E2").

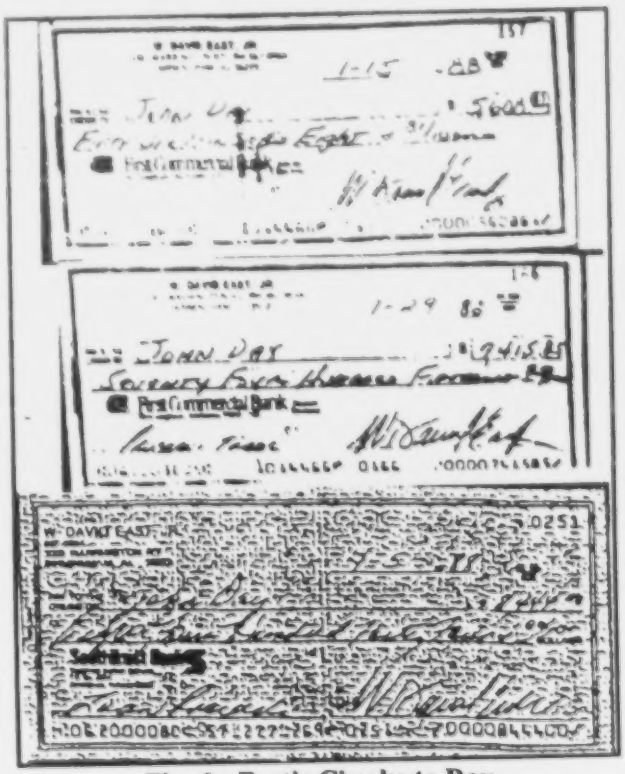

Fig. 6: East's Checks to Day

Cashier's Check Financings. Margin rules required the brokers to pay for their buys the next day, though they had already sold yesterday at a

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profit. They borrowed some $563,000 from the Vickers Defendants, who provided cashier's checks of $30,000-$122,500 on a morning's notice, to pay for yesterday's "buys." The Brokers repaid immediately with checks on yesterday's profit, adding loan fees of $500-$1,200. For example, Day's first profits (January 4, "D1" and "D2") cost exactly $60,644.32 for the two buys. (He sold them that day for $74,015.11, a $13,000 profit; only then were they allocated to Day's account.) Vickers wrote a $60,644.32 Birmingham Hide AmSouth Bank check and got a $60,644.32 AmSouth cashier's check for Day. Day paid for the options, then got a PaineWebber $61,144.32 check ($500 more, payable to Day), which Vickers deposited back to Birmingham Hide (checks and deposit slip, Fig. 7).

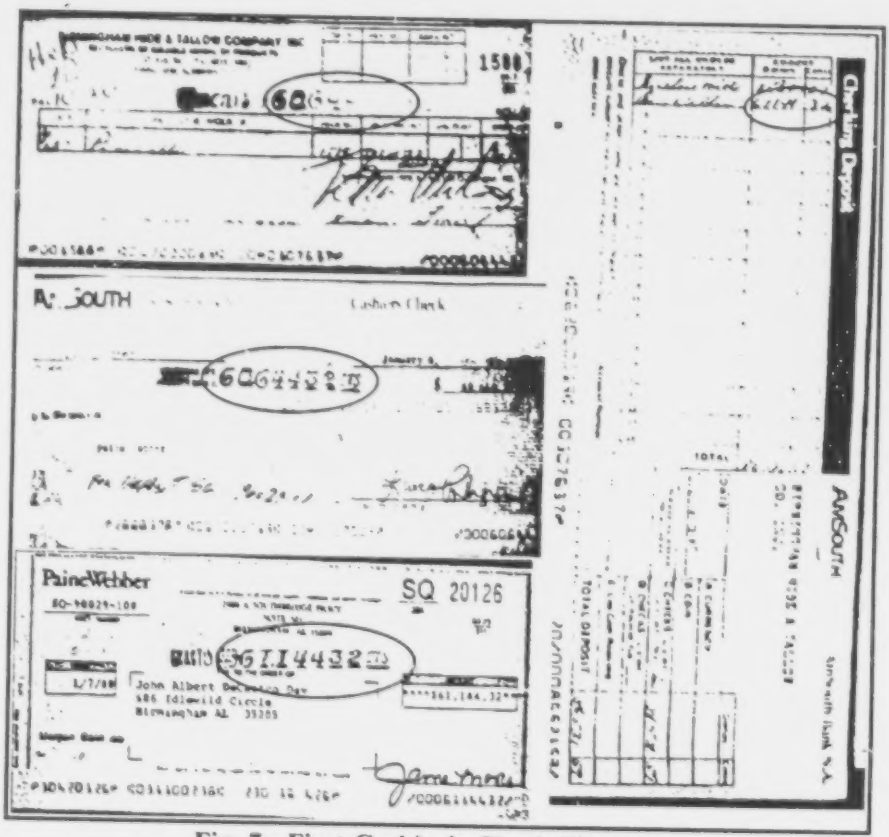

Fig. 7: First Cashier's Check Financing

The Tape-Recorded Untrue Statements and Omissions. The

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quintessential offense, under either federal or state securities laws, is to make "any untrue statement of a material fact or to omit to state a material fact" in connection with the sale of securities (*infra*). Trustees on one occasion, on counsel's advice, tape-recorded Day's misrepresentations to them *inter alia* that they only had a $300,000 loss (it was over $1,000,000 by then); the options all still existed and could make the losses back (all had expired); and Day and his other customers had all suffered "tremendous losses" on S&P 100's (they - Day, East and Arnold - had profits). Such misrepresentations had begun as far back as December 1987 (TR 1788-90, 2103-4, 2110-4, 2269-2281, 1982-7); Mr. Shepherd and other witnesses so testified, and Day (pleading the Fifth) cannot be said to have contradicted them. A transcript was admitted into evidence at arbitration.[16] The district court had this arbitration exhibit before it. The material omissions are as conspicuous as the misrepresentations: Day did not inform Trustees that he could allocate options, and options had in fact been allocated, to their accounts *after* falling significantly in value, for example.

The district court's finding, not only of fraud, but also that any lesser conclusion would be "totally arbitrary, capricious and irrational," was justified by the record.

BASIS FOR FEDERAL JURISDICTION BELOW

The basis for federal jurisdiction below is diversity of citizenship and amount in controversy, under 28 U.S.C. §1332, and the existence of a federal question under 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

The federal and state securities laws are of vital interest to a broad spectrum of Americans. Brokerage accounts are not the province of the idle rich. In 1988 15.2% of U. S. households had money market deposit accounts; 9.4% had interest-earning securities; 21.8% owned stocks and mutual fund shares; and 24.2% had

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16 Trustees' arbitration Exh. 48. The PaineWebber Defendants suggested admitting the transcript, to avoid a playing of the tape itself.

IRA or KEOGH retirement accounts.[17] The vast majority of these had brokerage accounts; and these figures exclude persons with an indirect interest in brokerage accounts of trusts, corporate and union retirement plans, etc.

I. The Court Should Grant The Writ To Establish That Judicial Review Is Sufficient To Ensure That Arbitrations Recognize Statutory Claims.

The Court has held that arbitration is merely a choice of forum and not a waiver of rights; and that where the arbitrators do not take cognizance of statutory claims, judicial review is sufficient to ensure the statutes be duly followed. These admonitions have been consistent, and trace back to 1953.

In recent years the Court has required arbitration of statutory claims before arbitral tribunals that could reasonably be thought hostile to the statutes, and dominated by the party demanding arbitration. The Court reversed *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), in which it had refused to compel arbitration of a customer's dispute with a brokerage firm under the federal Securities Act of 1933. As the Court would later say in criticizing *Wilko*, its holding rested on a distrust that arbitration would adequately take cognizance of claims under the '33 Act. But even in *Wilko* both the majority and Justice Frankfurter's dissent agreed that arbitration is merely a choice of forum; and arbitrators are not free to ignore the statutory provisions for the claim.[18]

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17 1991 U. S. Statistical Abstract, Table 759, p. 468.

18 The majority: "We agree that in so far as the award in arbitration may be affected by legal requirements, statutes or common law, rather than by considerations of fairness, the provisions of the Securities Act control. This is true even though this proposed agreement has no requirement that the arbitrators follow the law." *Wilko*, 346 U.S. 427, 433-434, 74 S.Ct. 182, 186, 98 L.Ed. 168, 175. " ... it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would 'constitute grounds for vacating the award ... ' In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject ... to judicial review for error." 346 U.S. 427, 436., 74 S.Ct. 182,

It repeated this doctrine when in 1986 the Court compelled arbitration of an American firm's antitrust claim against a Japanese firm, before the "Japan Commercial Arbitration Association" - a forum which, the American firm argued plausibly, would be innately hostile to American antitrust laws. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). The Court indicated that should arbitrators not honor statutory claims, they could be reinstated:

> "Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes ... American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. Wilko v. Swan, 346 U.S., at 433-434 ...19 And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function. ... [A]t the award-enforcement stage ... it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.
>
> "19 ... Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to ***reinitiate suit in federal court***. We merely note that ***in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy***."
>
> 473 U.S. 614, 636-639, 105 S.Ct. 3346, 3359, 87 L.Ed.2d 444, 461-462..

Two years later the Court said the same in *Shearson/American*

187, 98 L.Ed. 168, 176.

The dissent: "If arbitration inherently precluded full protection of the rights ... the Securities Act affords ... then, of course, an agreement to settle the controversy by arbitration would be barred ...Arbitrators may not disregard the law. Specifically they are ... 'bound to decide in accordance with the provisions of section 12(2) [of the '33 Act].'" 346 U.S. 427, 439-440., 74 S.Ct. 182, 189, 98 L.Ed. 168, 177-178.

Express, Inc. v. McMahon, 482 U. S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987), when it required arbitration of claims under the Securities Exchange Act of 1934 and RICO by a customer against a brokerage firm before an arbitration sponsored by the NASD or one of the exchanges. Here the plaintiff argued - again reasonably - that the forums could be presumed hostile to both the statutory claims *and* the plaintiff. The NASD and the exchanges are literally associations composed of brokerage firms, and they choose the arbitrators and place of arbitration. Their rules require one of three arbitrators to be employed by a brokerage firm, which in turn is almost sure itself to be defending numerous similar suits as its representative sits in judgment on plaintiff's.

Though the Court compelled arbitration, it again went to considerable lengths to point out that it was not *de facto* repealing the applicable statutes:

> "Ordinarily, '[by] agreeing to arbitrate a statutory claim, ***a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum.***' *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U. S., at 628. ... " 482 U.S.220, 229-230, 107 S.Ct. 2332, 2339, 96 L.Ed.2d 185, 196.

> "[T]here is no reason to assume at the outset that arbitrators will not follow the law; ***although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.*** See [*Mitsubishi Motors*] .... ***reserving consideration of 'effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinstate suit in federal court.'***" 482 U.S. 220, 232, 107 S.Ct. 2332, 2340, 96 L.Ed.2d 185, 197.

The Court repeated these assurances when it required securities-industry arbitration of '33 Act claims, finally reversing *Wilko*, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490

U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). It stated it was not casting away the plaintiff's statutory claims:

> "'By agreeing to arbitrate a statutory claim, ***a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.***'" 490 U.S. 477, 481, 109 S.Ct. 1917, 1920, 104 L.Ed.2d 526, 534, citing *Mitsubishi Motors*.

In 1991 the Court required securities industry arbitration of a brokerage firm employee's claim under the Age Discrimination in Employment Act. *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991). Again however the Court reiterated that it did not countenance ignoring statutory claims:

> "'So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions." ___ U.S.___, 111 S.Ct. 1647, 1653, 114 L.Ed.2d 26, 38, citing *Mitsubishi Motors*.

> "Gilmer also contends that judicial review of arbitration decisions is too limited. We have stated however, that 'although judicial scrutiny of arbitration awards necessarily is limited, ***such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue***." ___ U.S. ___, 111 S.Ct. 1647, 1655 114 L.Ed.2d 26, 40, n. 4, citing *McMahon*.

In short, in entrusting statutory claims to potentially hostile arbitration forums, the Court has without exception indicated that judicial review would determine whether the arbitration took proper cognizance of statutory claims; and should the determination be that it did not, the ignored claims could be reinstated in court. That is all the district court did here.

The statutes involved here are primarily to the federal Securities

Act of 1933 ("'33 Act"); the Securities Exchange Act of 1934 ("'34 Act"); state securities acts; and, to a lesser degree and in extreme situations, RICO.

The Uniform Securities Act has been enacted in 42 of 52 U. S. jurisdictions (including the District of Columbia and Puerto Rico). Of all 52 jurisdictions, including the 10 *not* adopting the Act, *51* have mandatory full-rescission damages for material untrue statements or omissions; *45* provide for mandatory attorney's fees (though in Florida and Texas some judicial discretion is involved); and *50* provide for mandatory interest. The pertinent Alabama/Uniform Securities Act provisions themselves derive from and closely parallel those of the '33 Act, and the SEC's Rule 10b-5 under the '34 Act:

Fraudulent Practices. Federal and state laws against fraudulent practices are almost identical:

'33 Act	'34 Act	Alabama Act
Sec. 17. (a). It shall be unlawful for any person in the offer or sale of any security ...	**Rule 10b-5.** It shall be unlawful for any person, directly or indirectly, ...	**§ 8-6-17.** (a) It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:
(1) to employ any device, scheme or artifice to defraud, or	(a) to employ any device, scheme, or artifice to defraud,	(1) Employ any device, scheme or artifice to defraud;
(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact ... , or	(b) to make any untrue statement of a material fact or to omit to state a material fact ..., or	(2) Make any untrue statement of a material fact or to omit to state a material fact ..., or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.	(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.	(3) Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Untrue Statements and Omissions. Both federal and state law prohibit material untrue statements of fact or omissions to state material facts in connection with the sale of securities. The statutes are almost identical:

'33 Act	Alabama Act
Sec. 12. Any person who-	**§ 8-6-19.** (a) Any person who:
(2) offers or sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact .... and	(2) Sells or offers to sell a security by means of any untrue statement of a material fact or any omission to state a material fact .... and
... who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,	... who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission,

... shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.	... is liable to the person buying the security from him who may bring an action to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, ***court costs and reasonable attorneys' fees,*** less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

In this case, the arbitrators could not fail to find material untrue statements and omissions. Testimony to them was uncontradicted (the Brokers pleading the Fifth);[19] and on one occasion they had been tape recorded.[20] That being the case, full-rescission damages and interest were mandatory at federal and state law, and attorney fees as well at state law.[21]

"Control Person" Liability. The federal and state statutes provide that a person supervising or (under state law) an employee materially aiding the offense is himself liable, unless he can sustain a burden of proof that he had no knowledge of the facts giving rise to liability:

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19 The arbitrators specifically stated Shepherd's testimony as to his phone conversations with Day was unrefuted and believed, since Day was the only other party to the conversations and he took the Fifth (TR. 1858-1859).

20 The district court below held the record admitted of no conclusion less than common-law fraud, a considerably stricter thing to prove. Under the Uniform Act, intent (*scienter*) need not be proven. It is a "strict liability" statute; even a negligent misrepresentation or omission incurs full liability. See *Banton v. Hackney*, 557 So.2d 807, 826 (Ala. 1989) (on rehearing).

21 This petition will not discuss RICO. Suffice it to say that, though widely misused in the securities law area, on the facts of *this particular case* it would apply. It covers repetitive wire, mail and securities fraud by an enterprise of more than one person. 18 U.S.C. §§1961, 1962, 1964. Counsel is reminded of a juror's remark, in Truman Capote's *In Cold Blood*, about the death penalty: "Ordinarily I am against it, but in this case, no."

'33 Act	'34 Act	Alabama Act
Sec. 15. Every person who ... controls any person liable under section ... 12,	**Sec. 20.** (a) Every person who, directly or indirectly, controls any person liable under any provision of this title ...	**§ 8-6-19(c).** Every person who directly or indirectly controls a person liable under ... this section,
		including every partner, officer or director of such a person, every person occupying a similar status or performing similar functions, every employee of such a person who materially aids in the conduct giving rise to the liability, and every dealer or agent who materially aids in such conduct
shall also be liable jointly and severally ... , unless	shall also be liable jointly and severally ... , unless	is also liable jointly and severally ... , unless
the controlling person ***had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability ... is alleged to exist.***	the controllng person ***acted in good faith and did not directly or indirectly induce the act or acts constituting the violation*** ...	he is able to sustain the burden of proof that ***he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.***

Here Payne, the branch manager, was clearly supervising; and the

two senior brokers that complained, complained to him. As for East, under the Alabama Act he clearly "materially aided" Day's conduct - in fact, he paid Day for it, giving him back half the profits Day placed in East's account. Arnold "materially aided" by arranging the required $563,000 of cashier's-check financings with his customers, the Vickers Defendants. It is hard to see how they sustained a burden of proof that they did not know and reasonably could not have known what Day was doing, as they pled the blanket Fifth and refused to testify at all. Yet the arbitrators, on their own motion, dismissed them - a clear case of refusing to recognize an equally clear statutory claim.

II. The Court Should Grant The Writ To Resolve The Conflict Among Circuits As To The Standard Of Review On Appeal Of A District Court's Disposition Of An Arbitration Award.

The cases cited by the Eleventh Circuit opinion for its standard of review[22] themselves show the Eleventh Circuit is at odds with the others on this point, and the conflict should be resolved. The Court should grant the writ to enforce its prior holding in *Pullman-Standard v. Swint*, 456 U.S. 273, 72 L.Ed.2d 66, 102 S.Ct. 1781 (1982), in which it reversed the Eleventh Circuit for doing exactly what it does again here - reviewing *de novo* a district court's finding of ultimate fact. In *Pullman-Standard*, the finding of fact was that the motivation of an employment seniority system was not racial discrimination; here, it is that (from an arbitration record under

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22 *Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481 (9th Cir. 1991); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017 (5th Cir. 1990); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215 (6th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991); *Independent Employees' Union of Hillshire Farm Co. v. Hillshire Farm Co.*, 826 F.2d 530 (7th Cir. 1987). None stand for a different standard of review of vacations, than of confirmations. None stand for a *de novo* review other than of conclusions of law, such as contract interpretation. *Employers Ins.* held the district court's *underlying factual findings* were reversible only if clearly erroneous, 933 F.2d 1485. *Forsythe* remanded for the district court to *redetermine proper damages*, 915 F.2d 1023. *Anderman/Smith* never mentions a *de novo* standard of review. *Independent Employees' Union* noted that the district court can reverse arbitrators' decisions if "*irrational*," 826 F.2d 533.

oath) any lesser finding than fraud would be "totally arbitrary, capricious and irrational." The standard of review on this issue is whether the finding was "clearly erroneous," not a *de novo* review. All the more so, given *Pullman-Standard*'s practical wisdom - the appellate courts are not designed to make *de novo* findings of fact, can do so only with the greatest difficulty, probably will not do so, and seem not to havee done so here.

III. The Court Should Grant The Writ To Resolve The Conflict Among Circuits As To Vacation Of Arbitrations For "Manifest Disregard Of The Law."

The Eleventh Circuit in this case again declined to adopt the standard; other circuits recognize it.[23] The "manifest disregard" doctrine traces to the Court's own observation in *Wilko* that "the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko v. Swan*, 346 U.S. 427, 436-437, 74 S.Ct. 182, 187-188, 98 L.Ed. 168, 176. There is an interrelationship of "manifest disregard" and the Court's assurances in *Mitsubishi Motors*, *McMahon*, *Rodriguez de Quijas* and *Gilmer* that arbitrators are bound to vindicate statutory claims, and that judicial review is sufficient to ensure they do so. If a district court that finds "manifest disregard" (whether by that name, or another) of such a statutory claim is powerless to vacate the arbitration, how can it perform such a sufficient judicial review? The district court would be relegated to the function of the three monkeys at the Japanese shrine - "hear no evil, see no evil, speak no evil."

IV. The Court Should Grant The Writ To Ensure Fair Arbitration Hearings.

In arbitration plaintiffs have the right to question defendants, as

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[23] E.g., *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir. 1990); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891 (2d Cir. 1985); *Anaconda Co. v. District Lodge No. 27 of the International Association of Machinists and Aerospace* Workers, AFL-CIO, 693 F.2d 35 (6th Cir.1982); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986); *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265 (9th Cir. 1987).

at trial. What occurred here was not even a *bona fide* plea of the Fifth Amendment. It was an outright refusal to testify by the parties who forced the arbitration, with the arbitrators acquiescing. The Brokers and PaineWebber knew Nelson, J. had already ruled that the Brokers had no right to take a "blanket Fifth," and had waived the Fifth Amendment as to the subject matter of the arbitration, as Guin, J. later also ruled. The arbitrators' refusal to allow Trustees to question the Brokers clearly deprived them of a vital legal right, and (in Justice Frankfurter's words, from his *Wilko* dissent) "inherently precluded full protection" of their rights under the securities laws. The Brokers had waived the Fifth as to the subject matter at issue and should have been subjected to cross-examination. To whatever extent they could still take the Fifth, inference was to be taken against them.[24] Not to allow them to call the Brokers was a deprivation of property without due process of law, within the meaning of the Fifth Amendment.[25]

There is, further, a public policy question. To leave arbitrators discretion to refuse plaintiffs the right to question Fifth-pleading defendants (even those that have waived the Fifth), will have a chilling effect upon law enforcement. In effect this ruling was Trustees' "punishment" for reporting crimes to the proper authorities. What defrauded customer will cooperate with the SEC or a state securities commission, knowing that the penalty may be loss of the right to a fair hearing to recover that of which he was defrauded?

CONCLUSION

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[24] *United States v. Mammoth Oil Co.*, 14 F.2d 705 (8th Cir. 1926), *aff'd* 275 U.S. 13, 48 S.Ct. 1, 72 L.Ed. 137 (1927); *Pagel, Inc. v. S.E.C.*, 803 F.2d 942 (8th Cir. 1986).

[25] *In re: Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). The Eleventh Circuit purported to find a bargain, wherein the arbitrators only agreed to proceed with the arbitration upon Trustees' representation that the Brokers' testimony was "unimportant." No such bargain was made, as the arbitrators did not rule whether the Brokers could be questioned until October 1990 (three months after arbitration commenced) or that they would not enforce a waiver of the Fifth until December 1990. But even were such a bargain demanded by the arbitrators, that demand would be a deprivation of due process and of the protection of the securities laws.

The Court should issue a writ of certiorari, to ensure that its decisions in *McMahon* and *Rodriguez de Quijas* are not used as waivers of statutory claims under the securities laws and RICO; to ensure that the Eleventh Circuit follow the Court's ruling in *Pullman-Standard* that it not review findings of fact *de novo*; to resolve the split decisions among the circuits as to whether "manifest disregard of the law" is grounds to vacate an arbitration; and to establish that plaintiffs' statutory claims may not be subverted by refusing to let them question defendants in arbitration as they would have been able to at trial. If the Eleventh Circuit decision stands, it will be widely and rightly regarded (taken together with *McMahon* and *Rodriguez de Quijas*) as a judicial, *de facto* repeal of the '33 Act, the '34 Act, the state securities acts and RICO.

July 28, 1992.

Respectfully submitted,

Robert B. Eubank

APPENDICES

APPENDIX A

Robbins, et al. v. PaineWebber Inc., et al.
761 F.Supp. 773 (N.D.Ala. 1991)

Irene ROBBINS and Bert Shepherd, Trustees of the Davis Robbins Family Trust and the Davis Robbins Marital Trust, Plaintiffs,

v.

PAINEWEBBER INCORPORATED, John Day, Jerry Payne; David L. Arnold; W. David East; Owen Vickers; Harvey Gotlieb; Alabama Grease Products Company; Birmingham Hide and Tallow Company, Defendants.

PaineWebber Incorporated, Plaintiff,

v.

Irene ROBBINS and Bert Shepherd, Trustees of the Davis Robbins Family Trust and the Davis Robbins Marital Trust, Defendants.

Irene ROBBINS and Bert Shepherd, Trustees of the Davis Robbins Family Trust and the Davis Robbins Marital Trust, Plaintiffs,

v.

David L. ARNOLD; W. David East; Owen Vickers; Harvey Gotlieb; Alabama Grease Products Company; Birmingham Hide and Tallow Company, Defendants.

Civ. A. Nos. 88-G-0978-S, 88-G-1016-S and 89-G-0613-S.

United States District Court,
N. D. Alabama, S.D.
April 19, 1991.

MEMORANDUM OPINION

GUIN, Senior District Judge.

This cause is before the court on the trustees' petition to vacate the arbitration award and to reinstate the civil action and on motions by defendants for confirmation of the arbitration award. Having considered the briefs and submissions of counsel, the record,[1] and the applicable law, the court finds that the plaintiffs' motion is due to be granted. The court is convinced on multiple grounds that the arbitral award is due to be vacated and the civil action reinstated. Accordingly, defendants' motions are due to be denied.

A relatively brief recitation of the facts and procedural history is necessary at this juncture in the case. The case at bar concerns the management of brokerage accounts established by plaintiffs Irene Robbins and Bert Shepherd with defendant PaineWebber. Plaintiffs established these accounts in their capacities as trustees of the Davis Robbins Family Trust (family trust) and the Davis Robbins Marital Trust (marital trust). The trusts were created in 1972 by the will of Davis Robbins, the now deceased husband of plaintiff Irene Robbins. Mr. Robbins died in 1976, and the trusts were funded upon the closing of his estate several years later.

The plaintiffs established brokerage accounts with PaineWebber for the trusts in November and December 1987. Their broker was John Day. Day had previously been employed at Thomson McKinnon and had managed the trusts' brokerage accounts there. When he moved to PaineWebber, the trustees also moved their accounts, so that Day could continue to manage the accounts.

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[1] Defendant David East has filed an objection to plaintiffs' April 1, 1991, Notice of Filing. The defendant objects to this filing to the extent it seeks to include in the record any exhibit not admitted during the arbitration of this matter. Exhibits not admitted by the panel have not been considered by the court in reaching the instant decision. Even in the absence of such an objection, such exhibits would not properly be before this court in its consideration of these motions. The court further notes that the filing of this objection was tardy.

On June 8, 1988, the plaintiffs brought an action in the 30th Judicial Circuit Court of Alabama, alleging that, in regard to the trusts' accounts, the defendants engaged in unauthorized trading of options, churning, and preferential allocations in relation to the option trading. Plaintiffs allege that this fraudulent mismanagement took place between December 1987 and March 1988. On June 14, 1988, defendants filed a petition to remove the case to this court (CV 88-G-0978-S). On June 20, 1988, the defendants filed an action in this court to compel arbitration of the dispute underlying the original action (CV 88-G-1016-S). A petition for an order compelling arbitration was filed contemporaneously with this second complaint.

The cases were consolidated by the order of this court on August 30, 1988. Plaintiffs' motion to remand was denied by this court on August 30, 1988, and the consolidated cases were then allowed to proceed in normal fashion. On January 20, 1989, the trustees filed a motion to amend the complaint to add additional defendants. The plaintiffs sought to add David Arnold, David East, Owen Vickers, Harvey Gotlieb, Alabama Grease Products Company, and Birmingham Hide and Tallow Company as defendants. The defendants objected to this amendment, and on March 10, 1989, this court denied that motion. On April 10, 1989, the plaintiffs filed a separate action in this court naming the aforementioned additional defendants as the defendants in that case (89-G-0613-S). This case was originally assigned to the Honorable James Hancock, then to the Honorable William Acker, and then to the Honorable Edwin Nelson.

The two original cases were sent to arbitration by order of this court on June 8, 1989. For purposes of arbitration, the allegations against defendants Arnold and East made in the last filed case were consolidated with these two cases. Following the arbitration, the third case was consolidated with the other two for the limited purpose of deciding the defendants' motions for confirmation of the arbitration award and the plaintiffs' motion to vacate the arbitration award and to reinstate the civil actions. It was later consolidated for all purposes and transferred in its entirety to this judge.

Arbitration hearings were held on July 23-25, October 15-17, December 5-7, and December 18-20, 1990. On January 10, 1991, the arbitrators issued their decision which held defendants John Day and PaineWebber, Inc. jointly and severally liable to the plaintiffs for the sum of three hundred twenty-five thousand dollars ($325,000.00) exclusive of interest. These defendants were further assessed twenty-one thousand dollars of forum fees. Each party was to bear its own costs and attorneys' fees. The panel further denied the claims for punitive damages and for treble damages under RICO. On its own motion, the panel dismissed with prejudice the claim for damages for emotional pain and suffering. On its own motion, the panel also dismissed with prejudice the claims against defendants Jerry Payne, Arthur James Huff, Bruce A. Bursey, Thomas P. Hart, W. David East, and David L. Arnold.

Claimants have moved for the vacation of the arbitration award and reinstatement of the civil action. The defendants have filed motions for confirmation of the arbitral award. The scope of review of arbitral awards is a narrow one. This court must determine whether a fundamentally fair hearing has taken place. *National Post Office Mailhandlers v. United States Postal Service*, 751 F.2d 834 (6th Cir. 1985). The Eleventh Circuit Court of Appeals has stated that "[c]ourts are not to vacate arbitral awards except in the rare instances when the arbitrators commit egregious error, make an irrational award, or exceed a specific contractual limitation on the scope of their authority." *Ierna v. Arthur Murray International, Inc.*, 833 F.2d 1472, 1476-77 (11th Cir. 1987). The court finds that the case at bar falls within these strictures.[2] The court finds that the arbitral award is due to be vacated and the civil action reinstated under the provisions of 9 U.S.C. § 10.

The arbitration hearings were made up of several three day sessions which were held over a five month period from July to

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[2] Some of plaintiffs' grounds for vacation, such as bias and partiality, would require an evidentiary hearing to prove or disprove. Such matters cannot be decided on the strength of the arbitral record alone. *Legions Insurance Co. v. Insurance General Agency, Inc.*, 822 F. 2d 541, 543 (5th Cir. 1987). There exist, however, several grounds supporting vacation which can be decided on the submissions of counsel and the record.

December 1990. In January 1990, prior to the occurrence of any of the hearings, defendants Day, Payne, East, and Arnold (the indicted respondents) were indicted in the 30th Judicial Circuit Court of Alabama on allegations of securities fraud arising from the same set of facts which gave rise to the instant litigation. Consequently, these defendants pled the fifth amendment's provision against self-incrimination at the arbitration hearings and refused to testify as to their names and current addresses. Under the umbrella of the fifth amendment's privilege against self-incrimination, the arbitration panel (panel) allowed this blanket refusal. This allowance of a blanket fifth amendment plea "is unacceptable since it forces the reviewing court to speculate as to which questions would tend to incriminate." *Anglada v. Sprague*, 822 F.2d 1035 (11th Cir. 1987). This error by the panel was an egregious error which, in and of itself, requires the vacation of the award under 9 U.S.C. § 10(c). It constituted a refusal "to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(c).

This allowance of a blanket fifth is unacceptable on another significant ground as well. The indicted defendants Arnold, Day, East, and Payne had been deposed in preparation for the original suit (88-G-0978-S). They answered a fairly broad spectrum of questions. For purposes of these actions, they have lost their fifth amendment rights as to the topics invaded on deposition.[3] Plaintiffs had the right to examine these defendants at the arbitration hearings

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[3] Defendants East and Arnold attempt to draw a distinction concerning which proceeding they gave the depositions for. They argue that because their depositions were given in relation to the initial case there was no waiver as to the third case. It was as defendants in the third case that they were brought into the arbitration. This is a distinction without a difference. The three cases arose out of the same facts and should have been one case at all times. Indeed, the court has now consolidated them for all purposes. Further, the court has allowed amendment of the initial complaint to add as party defendants the defendants named in the third filed case. Additionally, in their motions to quash deposition subpoenas in the third case, the defendants stated that they were willing to stipulate to the use of the depositions for any evidentiary purpose in the third case. The depositions were admitted into evidence without objection at the arbitration hearing. These defendants cannot now complain that their fifth amendment rights would be violated by their having to testify regarding the topics already invaded by these depositions. *U.S. v. White*, 846 F.2d 678, 690 (11th Cir. 1988).

regarding the invaded topics. The Eleventh Circuit has stated that "[a] witness who testifies at any proceeding, instead of asserting his Fifth Amendment rights, loses the privilege. [*Minnesota v.*] *Murphy*, 465 U.S. [420] at 427, [79 L. Ed. 2d 409, 419] 104 S. Ct. [1136] at 1142 [1984]." *U.S. v. White*, 846 F.2d 678, 690 (11th Cir. 1988).[4] The panel's failure to allow examination on the invaded topics constituted a refusal to hear pertinent and material evidence. This failure was a violation of the Federal Arbitration Act requiring vacation of the arbitral award. 9 U.S.C. § 10(c).

The plaintiffs further contend that the panel acted in manifest disregard of the law. The court agrees. While the Eleventh Circuit has not adopted this standard, it has defined it. That court has stated that "[t]o prove that an arbitrator manifestly disregarded the law, a party must show (1) that the error is so obvious that it would be 'readily and instantly perceived' by a typical arbitrator, and (2) that the arbitrator was subjectively aware of the proper legal standard but proceeded to disregard it in fashioning the award. ... [*Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 at 933 (2d Cir. 1986)]. Furthermore, the knowing disregard of the law must be apparent on the face of the record." *Raiford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412-13 (11th Cir. 1990). The Eleventh Circuit expressed doubt in that opinion that it would ever adopt this standard because of the difficulty involved in meeting it when, as in the typical arbitral award, no rationale is given by the panel. That court, however, did not preclude its application under the proper circumstances. The

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[4] The term waiver is commonly used in relation to the loss of one's fifth amendment rights, but the Supreme Court has abandoned this term. In *Minnesota v. Murphy*, the Supreme Court stated that "[w]itnesses who failed to claim the privilege were once said to have 'waived' it, but we have recently abandoned the 'vague term,' *Green v. United States*, 355 US 184, 191, 2 L Ed 2d 199, 78 S Ct 221 [225], 7 Ohio L Abs 202, 61 ALR2d 1119 (1957), and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.' *Garner v. United States*, [424 U.S. 648] ... at 654, n 9, 47 L Ed 2d 370, 96 S Ct 1178 [1182, n. 9]." *Minnesota v. Murphy*, 465 U.S. 420, 427, 104 S.Ct. 1136, 1142, 79 L.Ed 2d 409, 419 (1984). The term *waiver* is still used in common parlance and will be used herein for its shorthand value but with the clarification previously stated in mind.

case at bar presents such circumstances.

In the instant case, the panel held defendants John Day and PaineWebber jointly and severally liable for three hundred twenty-five thousand dollars. No rationale was given, but the panel specifically stated that all RICO claims were denied. As the most likely scenario, PaineWebber suggests in its brief that the panel calculated the plaintiffs' losses January 25, 1988, forward to arrive at the sum awarded. For purposes of this court's ruling on the matter before it, however, it is essentially immaterial what date was chosen. The critical fact is that by this award the panel acknowledged the occurrence of wrongdoing on the part of the defendants Day and PaineWebber. The question presented is whether having found wrongful conduct the panel showed manifest disregard of the law in fashioning its award. The court finds that it did.

In making its award, the panel by necessity had to have found fraud. The record on its face supports a finding of fraud and deceit.[5] Deceit, misleading by omission, and fraud are all prohibited by the Alabama Securities Act. Ala.Code § 8-6-17. In the face of such violation, the statute requires the award of attorneys' fees and costs. The panel failed to apply the statutory damages provision, Alabama Code § 8-6-19. This failure constitutes a manifest disregard for the law that meets the test defined by the Eleventh Circuit. The error of not applying this provision would be readily and instantly perceived by a typical arbitrator; these arbitrators were cognizant of the proper legal standard and disregarded it in fashioning the award; and their disregard of the applicable law is indisputably apparent on the face of the record. *Raiford v. Merrill, Lynch, Pierce, Fenner & Smith*, 903 F. 2d 1410, 1412-13.

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[5] The wrongs committed were not acts of negligence. Nothing in the record suggests that the loss suffered by the plaintiffs was the product of negligence. If the court were to remand the case to the panel for clarification of its decision and the panel were to state that its award was based on a finding of negligence, this court would have to vacate the award as totally arbitrary, capricious, and irrational. *Ierna v. Arthur Murray International, Inc.*, 833 F.2d 1472, 1476-77 (11th Cir. 1987). Such a remand would, therefore, be a moot exercise. This theory is not argued by defendants' counsel, but negligence was pled. The

The court must express its amazement at the panel's denial of RICO (Racketeer Influenced and Corrupt Organizations) claims. In the face of the fraud shown, the court finds that the panel again displayed a manifest disregard for the law by its refusal to apply this statute. RICO specifically includes "fraud in the sale of securities." 18 U.S.C. § 1961 (1)(D). The panel specifically denied claims under this statute. Again, the court finds that the Eleventh Circuit's requirements for a finding of manifest disregard of the law have been met. The damages provision of this act should have been applied by the panel. This provision calls for the trebling of damages and the award of attorneys' fees and costs. 18 U.S.C. § 1964(c). No such award was made.

In accordance with the foregoing opinion, arbitration award 89-01737 issued on January 10, 1991, is hereby vacated as to all parties to the above-captioned actions, and the civil proceedings in these cases are hereby reinstated. An order in accordance with this opinion will be entered contemporaneously herewith.

DONE and ORDERED.

ORDER

This cause is before the court on the trustees' motion to vacate the arbitration award and to reinstate the civil actions. Also before the court are motions by defendants for confirmation of the arbitration award. In accordance with the opinion entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the trustees' motion to vacate the arbitration award 89-01737, entered January 10, 1991 by a National Association of Securities Dealers, Inc. (NASD) panel of arbitrators, is hereby GRANTED as to all parties to the above-captioned actions. It is

FURTHER ORDERED, that all motions by defendants for

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court, therefore, has addressed and dispensed with this theory as a possible basis for the award.

confirmation of the arbitration award are hereby DENIED. It is

FURTHER ORDERED that the civil proceedings in the above-styled consolidated actions are hereby REINSTATED. It is

FURTHER ORDERED that this case is hereby SET FOR TRIAL before this court on Monday, June 3, 1991, at 9:30 a.m.

DONE AND ORDERED.

APPENDIX B

Robbins, et al. v. Day, et al.

954 F.2d 679 (11th Cir. 1992)

Irene ROBBINS and Bert Shepherd, a/k/a Trustees of the Davis Robbins Family Trust, a/k/a Trustees of the Davis Robbins Marital Trust, Plaintiffs-Appellees,

v.

John DAY, PaineWebber Incorporated, Jerry Payne, Defendants-Appellants

PAINEWEBBER INCORPORATED, Plaintiff-Appellant,

v.

Irene ROBBINS and Bert Shepherd, a/k/a Trustees of the Davis Robbins Family Trust, a/k/a Trustees of the Davis Robbins Marital Trust, Defendants-Appellees.

Irene ROBBINS and Bert Shepherd, a/k/a Trustees of the Davis Robbins Family Trust, a/k/a Trustees of the Davis Robbins Marital Trust, Plaintiffs-Appellees,

v.

David L. ARNOLD, W. David East, Defendants-Appellants,

Owen Vickers, Harvey Gotleib [*sic*], Alabama Grease Products Company, Birmingham Hide and Tallow Company, Defendants.

William E. Richardson, et al., Unknown

No. 91-7332.

United States Court of Appeals,
Eleventh Circuit.

Feb. 27, 1992.

Before COX and DUBINA, Circuit Judges, and BROWN* , Senior District Judge.

DUBINA, Circuit Judge:

Appellants PaineWebber Incorporated ("PaineWebber"), John Day, Jerry Payne, David Arnold, David East, et al. (individually referred to by name or collectively as the "Brokers"), appeal the district court's order vacating an arbitration award and restoring the case on the district court's docket, 761 F. Supp. 773. For the reasons which follow, we reverse.

I. PROCEDURAL BACKGROUND

In November and December, 1987, Irene Robbins and Bert Shepard [*sic*] ("the Trustees"), trustees of the Davis Robbins Family Trust and the Davis Robbins Marital Trust ("the Trusts"), established brokerage accounts (the "Accounts") with PaineWebber for the benefit of the Trusts. The Accounts were established at PaineWebber after John Day, who had managed the Trusts' brokerage accounts for three years at another firm, became employed by PaineWebber.

Subsequently, the Trustees filed a suit against the Brokers in the 30th Judicial Circuit of Alabama, alleging, *inter alia*, that the Brokers damaged the Trusts' Accounts by engaging in the unauthorized trading of options, by excessive trading which constituted churning the Accounts, and by preferentially allocating funds. The Trustees alleged that the above activity began when the Accounts were first established at PaineWebber and continued until March, 1988.

The action was properly removed by the Brokers to the United States District Court for the Northern District of Alabama. Pursu-

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* Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

ant to the arbitration clauses contained in the documents that established the Accounts, in the same day the action was removed, the Brokers filed a separate action to stay the removed lawsuit and to compel arbitration of all asserted claims. After discovery was completed, the district court stayed the action and referred all claims to the National Association of Securities Dealers, Inc. ("NASD") for arbitration.

After twelve days of arbitration hearings, the NASD panel awarded the Trustees $325,000.00 and dismissed the claims against two of the Brokers.[1] The arbitrators' decision did not explain their rationale for determining liability or their methodology for imposing damages.

The NASD Award "Case Summary" stated that the Brokers answered the Trustees' allegations by claiming that (1) the Trustees were aware of all trading activities; (2) the Accounts were handled in accordance with the Trustees' expressed instructions; (3) prior to the initiation of the lawsuit the Trustees never expressed any dissatisfaction with the Brokers' handling of the Accounts; and (4) the losses in the Accounts were due to the market break of October 19, 1987, when the equity investments in both accounts declined substantially.

The Brokers filed separate motions with the district court seeking confirmation of the arbitration award, while the Trustees moved to vacate the award. The district court ordered the parties to submit briefs and scheduled a hearing. After the briefs were submitted, ~~but before the hearing was held, and even before the filing of the arbitration transcript~~ ^ [and the arbitration transcript was filed],* the

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[1] The Trustees originally sought $4,200,000.00 in actual damages, $12,000,000.00 in punitive damages, $12,600,000.00 in RICO damages, attorneys fees, costs, and expenses totaling over $26,800,000.00 in damages.

* Ed. Note - This change appeared after the opinion's original publication at 1991-1992 CCH Sec.L.Rep. Par. 96,523. The original opinion accused the district court of vacating the arbitration before the arbitration record was filed. However the docket sheet, part of the record on appeal, indicated the arbitration record was filed April 3, 1991, and the arbitration vacated April 19, 1991.

district court canceled the hearing, entered its order vacating the arbitration award, terminated the stay, and reinstated the case on its trial docket. The Brokers then perfected this expedited interlocutory appeal.

II. STANDARD OF REVIEW

We will review *de novo* the district court's order to vacate the arbitration award. By reviewing the district court's order *de novo* we are establishing two standards of review for a district court's findings upon an arbitration award.

It is well established in this circuit that a district court's denial of a motion to vacate an arbitration award under the Federal Arbitration Statute, 9 U.S.C. § 1, et seq. (1970 & Supp.1991), is reviewed under an abuse of discretion standard. *Schmidt v. Finberg*, 942 F.2d 1571 (11th Cir.1991) (citing, *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412. n. 2 (11th Cir.1990)). However, for the same policy reasons that establish the narrower abuse of discretion standard as appropriate when reviewing a trial court's denial of a motion to vacate an arbitration award, we will review the granting of a motion to vacate *de novo*.[2]

In *Raiford*, this court recognized a national policy favoring arbitration. See also *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 *reh. den.*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 819 (1987). ("The Arbitration Act thus establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate."). Our circuit has also noted that "[t]he purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution

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[2] Other circuits review the district court's vacation of an arbitration award *de novo*. See *Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481 (9th Cir.1991); *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1020 (5th Cir. 1990); *Anderman/Smith Operating Co., v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, f.n. 2 (6th Cir.), *cert denied*, ---- U.S. ----, 111 S.Ct. 2799, 115 L.Ed.2d 972 (1991); *Independent Employees' Union of Hillshire Farm Co. v. Hillshire Farm Co.*, 826 F.2d 530, 532 (7th Cir. 1987).

that would be speedier and less costly than litigation." *Booth v. Hume Publishing, Inc.*, 902 F.2d 925 (11th Cir. 1990) (quoting, *O.R. Securities v. Professional Planning Assoc.*, 857 F.2d 742, 745-46 (11th Cir. 1988)).

Accordingly, the Federal Arbitration Act presumes that reviewing courts will confirm arbitration awards and that the courts' review of the arbitration process will be severely limited. *Hume Publishing*, 902 F.2d at 932. By reversing a district court's denial of a motion to vacate an arbitration award only upon abuse of discretion, we further the presumption that the arbitration proceeding was proper. Similarly, when a district court goes against the presumption that it should affirm an arbitration award, we must review *de novo* to protect the integrity of the arbitration process.

By broadly reviewing the grant of a motion to vacate an arbitration award, while narrowly reviewing confirmation of an award, we emphasize the unique context of arbitration, which requires deferential judicial review to promote the primary advantages of arbitration--speed and finality. *De novo* review of the granting of a motion to vacate enables us to assess whether the district court accorded sufficient deference in the first instance, an assessment that a more restrictive appellate review would frustrate. See *Forsythe International*, 915 F.2d at 1020. When a district court denies a motion to vacate an arbitration award, deference is presumed and, therefore, in that context, review under an abuse of discretion is adequate.[3]

III. DISCUSSION

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[3] See Stephen H. Kupperman & George C. Freeman III, *Selected Topics in Securities Arbitration: Rule 15c2-2, Fraud, Duress, Unconscionability, Waiver, Class Arbitration, Punitive Damages, Rights of Review, and Attorney's Fees and Costs*, 65 Tul.L.Rev. 1547, 1602-1604 (1991).

> The standard most likely to reflect the strong federal policy favoring arbitration is a hybrid standard--one that requires an appellate court to review confirmation of an award for an abuse of discretion and to review vacation of an award de novo. Such a standard would be even more deferential than [de novo review in both instances]... since it would require rigorous review of rulings vacating awards but only limited review of rulings confirming awards.

Id. at 1604.

A. *Arbitration Awards are to be Reviewed Narrowly*

When reviewing a district court's order vacating an arbitration award, we must apply the same legal standards that bound the district court. *Stay, Inc. v. Cheney*, 940 F.2d 1457 (11th Cir. 1991) (when making a *de novo* review of a summary judgment, this court must apply the same legal standards that bound the district court). It is well established that judicial review of a commercial arbitration award is extremely limited and federal courts should defer to the arbitrator's resolution of the dispute whenever possible. *Hume Publishing*, 902 F.2d at 931. The Congressional policy of promoting contractually imposed arbitration requires that courts do not intrude unnecessarily into questions settled by arbitration, lest the efficiency of the arbitration process be lost. *Anderman/Smith Operating Co.*, 918 F.2d at 1217.

The bases for the review of a commercial arbitration award are enumerated in 9 U.S.C. § 10 (Supp.1991);[4] *Schmidt*, 942 F.2d at 1576; *Raiford*, 903 F.2d at 1411; *O.R. Securities, Inc.*, 857 F.2d at 745; and *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378 (11th Cir. 1988). The statute does not allow the courts to "roam unbridled" in their oversight of arbitration awards, but carefully

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[4] The statute provides in pertinent part:

10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration---

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party may have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that mutual, final, and definite award upon the subject matter was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by arbitrators.

9 U.S.C. § 10 (Supp.1991).

limits judicial intervention to instances where the arbitration has been tainted in specified ways. *Raiford*, 903 F.2d at 1410; *Advest, Inc. v. McCarthy*, 914 F.2d 6 (1st Cir.1990). The statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more, such as misconduct pertaining to the proceedings on the part of the arbitrators or the parties. *O.R. Securities, Inc.*, 857 F.2d at 746.

Although the Supreme Court has limited the grounds for vacatur to the categories enumerated in 9 U.S.C. § 10, several federal courts have found other grounds, derived from the statutory list, for vacating arbitration awards in commercial cases. Specifically some courts have considered whether "manifest disregard of the law" by the arbitrators may warrant vacating an award. *O.R. Securities, Inc.*, 857 F.2d at 746; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986). Other courts, including this court, have held that an award may be vacated if it is "arbitrary and capricious." See *Raiford*, 903 F.2d at 1411-12 (citing *United States Postal Services v. National Assoc. of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988)). Although these courts have retained a very limited power to review arbitration awards outside of section 10, nonreviewability remains the general rule and exceptions are rare. *Advest Inc.*, 914 F.2d at 8; *Raiford*, 903 F.2d at 1413 ("When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process.")

B. *The District Court's Vacatur of the Arbitration Award*

The Trustees allege that the arbitration award was properly vacated because the arbitrators manifestly disregarded the law when fashioning the award, and they refused to "hear evidence pertinent and material to the controversy." See 9 U.S.C. § 10 (a)(3).

1. Manifest Disregard of the Law.

Although "courts are generally prohibited from vacating an arbitration award on the basis of errors of law or interpretation," this court has considered whether the "manifest disregard of the

law" by arbitrators is a proper basis for vacating an award in commercial cases. *Raiford*, 903 F.2d at 1411; *O.R. Securities*, 857 F.2d at 746 (citing *Bobker*, 808 F.2d at 937). Before a court may vacate an arbitration award on the basis of a manifest disregard of the law, "there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it." *O.R. Securities, Inc.*, 857 F.2d at 747. There is inconsistency among courts throughout the United States on the degree of the "showing in the record" required to satisfy the manifest disregard of the law standard. Some courts require that the arbitrator's subjective awareness of the disregarded law be actually stated in the award, while others are willing to infer awareness. *O.R. Securities, Inc.*, 857 F.2d at 746 (citing *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F. 2d 743 (8th Cir.), *cert denied*, 476 U.S. 1141, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986)) (Although declining to adopt the manifest disregard for the law standard, the court stated that the standard could only be satisfied when "arbitrators understand and correctly state the law, but proceed to disregard the same."). For example, in the Second Circuit, awareness may be inferred if the governing law has such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule, and not withstanding, "swept it under the rug." *Advest, Inc.*, 914 F.2d at 10; *Bobker*, 808 F.2d at 933.

Following Eleventh Circuit precedent, we decline to adopt the manifest disregard of the law standard. See *Raiford*, 903 F.2d at 1412. When no rationale is given for a lump sum award, as in this case, before we even consider reviewing the award on grounds not explicitly contained in the statute, we must first determine whether a rational ground for the arbitrators' decision can be inferred from the facts of the case. Where "a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." *Raiford*, 903 F.2d at 1413 (citing *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 894 (2d Cir. 1985)) (quoting *Sobel v. Hertz, Warner, & Co.*, 469 F.2d 1211, 1216 (2d Cir. 1972)); *Drummond Coal Co. v. United Mine Workers of Am.*, 748 F.2d 1495, 1497 (11th Cir. 1984) (cited by *Raiford* for the proposition that an arbi-

tration award may be vacated if irrational); *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117 (2d Cir. 1991).

It is well settled that arbitrators are not required to explain an arbitration award and that their silence cannot be used to infer a grounds for vacating the award. *O.R. Securities, Inc.*, 857 F.2d at 747. Therefore, to protect against negative inferences being derived from an arbitrator's silence, an arbitration award that only contains a lump sum award is presumed to be correct. *Hume Publishing*, 902 F.2d at 932; *Barbier*, 948 F.2d at 120-21. The onus is upon the party requesting the vacatur to refute this inference and in turn every rational basis upon which the arbitrator could have relied. *Schmidt*, 942 F.2d at 1577-78 (the court considers whether there was any reasonable basis upon which the arbitration panel may have acted); *O.R. Securities*, 857 F.2d at 748 ("At the outset, we note that ... the moving party... had the burden to set out sufficient grounds to vacate the arbitration award in his moving papers," and "a party seeking to vacate an arbitration award on the grounds of manifest disregard of the law may not proceed by merely objecting to the results of arbitration."); *Chasser v. Prudential Bache Securities*, 703 F. Supp 78, 79 (S.D. Fla. 1988). Only after it is determined that there could be no proper basis for the award, should a court consider looking beyond the statute to determine the applicability of court made standards for the vacatur of an arbitration award.

2. Statutory Bases for Vacating the Arbitration Award--
9 U.S.C. § 10(a)(3).

The Trustees allege that the arbitrators' failure to force the Brokers to testify and produce their personal financial statements is a proper basis for vacating the award. Although an arbitration award can be vacated under the arbitration statute, where "the arbitrators were guilty of misconduct...in refusing to hear evidence pertinent and material to the controversy; ...," 9 U.S.C. § 10(a)(3), the section is not satisfied in this case.

The Brokers pled Fifth Amendment's provision against self incrimination during the hearings and refused to testify because they

were under indictment for securities fraud arising from the same set of facts which gave rise to the instant litigation. The award should not be vacated under section 10(a)(3) because prior to the arbitration hearings both PaineWebber and the Brokers moved to postpone the hearings until after the pending criminal proceedings concluded, which then would have made it possible for the Brokers to testify.

The Trustees opposed the continuance, and represented to the arbitration panel that the Brokers' testimony was "unimportant" to the Trustees' case. The Trustees stated in their "Opposition to Motion for Postponement of Hearing" that,

> The testimony of the Criminal Defendants is, at any rate, unimportant to either the civil or criminal proceedings. The principle proof against them in both is documentary....

In addition, the Trustees represented to the arbitrators that the Brokers had a right to invoke the Fifth Amendment. They stated to the arbitrators that,

> If the defendant [Brokers] wishes to plead the [f]ifth [a]mendment at trial [or hearing], he can do so. But the trial [or hearing] should go on as scheduled.

Based upon the above representations, the arbitration hearing was not postponed.

A federal court may vacate an arbitrator's award under 9 U.S.C. § 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing. Further, an arbitration award must not be set aside for the arbitrator's refusal to hear evidence that is cumulative or irrelevant. *Hoteles Condado Beach, La Concha and Convention Center v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985). In the present case, it was within the arbitrator's broad discretion to accept the Trustees' representations that the Brokers' testimony was "unimportant" to their case and that if given would only provide cumulative evidence.

An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence. *Hoteles Condado Beach*, 763 F.2d at 38; *Sunshine Mining Co. v. United Steelworkers of America*, 823 F.2d 1289 (9th Cir.1987); *Chasser*, 703 F.Supp at 79. In applying the statutory grounds for the granting of a motion to vacate an award, we always bear in mind that the basic policy of conducting arbitration is to offer a means of deciding disputes expeditiously and at lower costs. *Schmidt*, 942 F.2d at 1576. Thus, the Federal Arbitration Act allows arbitration to proceed with only a summary hearing and with restricted inquiry into factual issues. *Hume Publishing*, 902 F.2d at 931 (citing *O.R. Securities*, 857 F.2d at 747-48). The arbitrator is not bound to hear all the evidence tendered by the parties; he need only give each party the opportunity to present its arguments and evidence. *Forsythe International*, 915 F.2d at 1022 ("an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him"). We will not undermine the expedience of arbitration to determine the materiality or pertinence of excluded evidence that the moving party agreed was unimportant. See *Gilmer v. Interstate/Johnson Lane Corp.*, ---U.S.---, 111 S.Ct. 1647, 1654, 114 L.Ed.2d 26 (1991) ("Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

IV. CONCLUSION

Our deferential review of the arbitrator's award satisfies us that the arbitrators stayed well within their broad discretion in facilitating a fair hearing and in fashioning the award. Because the district court when vacating the award failed to adhere to the narrow and deferential standard of review, we reverse and confirm the arbitrator's award.

REVERSED and CONFIRMED.

FILED
U.S. COURT OF APPEAL
ELEVENTH CIRCUIT
APR 30 1992
MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-7332

IRENE ROBBINS and BERT SHEPHERD,
a/k/a Trustees of the Davis Robbins
Family Trust, a/k/a Trustees of
the Davis Robbins Marital Trust, Plaintiffs-Appellees,

versus

JOHN DAY, PAINEWEBBER INCORPORATED,
JERRY PAYNE, Defendants-Appellants

PAINEWEBBER INCORPORATED, Plaintiff-Appellant,

versus

IRENE ROBBINS and BERT SHEPHERD,
a/k/a Trustees of the Davis Robbins
Family Trust, a/k/a Trustees of
the Davis Robbins Marital Trust, Defendants-Appellees.

IRENE ROBBINS and BERT SHEPHERD,
a/k/a Trustees of the Davis Robbins
Family Trust, a/k/a Trustees of
the Davis Robbins Marital Trust, Plaintiffs-Appellees,

versus

DAVID L. ARNOLD, W. DAVID EAST, Defendants-Appellants,

OWEN VICKERS, HARVEY GOTLIEB,
ALABAMA GREASE PRODUCTS COMPANY,
BIRMINGHAM HIDE AND TALLOW
COMPANY, Defendants.

WILLIAM E. RICHARDSON, et al., Unknown

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 27, 1992, 11th Cir., 19__, ___ F.2d ___).

Before: COX and DUBINA, Circuit Judges, and BROWN,* Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

---

*Honorable Wesley E. Brown, Senior U.S. District Judge for the District of Kansas, sitting by designation.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX C
Robbins, et al. v. Day, et al.
NASD No. 89-01751

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant(s)

Irene Robbins & Bert Shepherd,
Trustees of the Davis Robbins Family
Trust and the Davis Robbins
Marital Trust

89-01751

Name of Respondent(s)

Roland Day
John Albert DeCastro Day

CASE SUMMARY

- Claimants alleged that Respondents executed trades in the Claimants' accounts without prior orders from, or the permission of, or even prior notice to, the Claimants, damaging the Trusts' accounts. The Claimants further alleged that the trades executed by the Respondents were excessive and constituted churning in an effort to generate commissions. The Claimants also alleged that the Respondent John Day was improperly supervised by Roland Day who allegedly was aware at all times of the activity in the Trusts' accounts. Respondents maintained that the Claimant Bert Shepherd monitored all activity in the accounts and was congnizant [*sic*] at all

times of the methods of trading and status of accounts. Respondents further maintained that the accounts were handled in accordance with the desires and instructions of the Trustees who never expressed any dissatisfaction with the manner in which the accounts were handled until a law suit was filed in January 1989. Respondents also maintained that losses in the Claimants' accounts were due to the market break of October 19, 1987 when the equity investments in both accounts declined substantially in value.

RELIEF REQUESTED

Claimants requested $4,200,000.00 in actual damages, $12,000,000.00 in punitive damages, $12,600,000.00 in RICO damages, attorneys' fees, costs, and expenses. Respondents requested that the claims of the Claimants be dismissed.

AWARD

On September 24, 1990, October 1, 1990, October 22, 1990, October 23, 1990, and October 24, 1990 in Atlanta, Georgia, the undersigned arbitrators heard the controversy between the parties as set forth in submissions to arbitration signed by the Claimants on June 14, 1989, by Respondent Roland Day on September 15, 1989, and by Respondent John Day on September 15, 1989. The initial Statement of Claim was filed on June 16, 1989. The arbitration panel having considered the pleadings, the testimony, the evidence presented at the hearing, and all post-hearing submissions, has determined in full and final resolution of all issues submitted for determination as follows:

(1) Respondents Roland Day and John Day are jointly and severally liable to the Claimants in the amount of Three Hundred Seventy Five Thousand Dollars and No Cents ($375,000.00).

(2) The Claimants' claim for punitive damages is denied.

(3) The Claimants' claim for RICO damages is denied.

(4) The Respondents' Motion to Recess the Hearing is denied as unanimously determined by this panel at the hearing of this matter.

(5) The parties shall each bear their respective costs including attorneys' fees.

(6) Pursuant to Section 43 of the Code of Arbitration Procedure, Respondents Roland Day and John Day are hereby assessed $2,500.00 in forum fees. $1,000.00 of the $2,500.00 shall be reimbursed to the Claimants as a refund of their initial filing fee, and $1,500.00 of the $2,500.00 shall be made payable to the NASD, Inc. as costs of the ten hearing sessions conducted in this matter.

CONCURRING ARBITRATOR

/s/_____
Harold Siegel

DISSENTING ARBITRATOR

/s/_____
Stuart Meyers

CONCURRING ARBITRATOR

/s/_____
David Saylor

Dated: January 8, 1991

APPENDIX D
Robbins, et al. v. PaineWebber Inc., et al.
NASD No. 89-01737

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between:

IRENE ROBBINS AND BERT SHEPHERD, TRUSTEES FOR THE DAVIS ROBBINS FAMILY TRUST AND THE DAVIS ROBBINS MARITAL TRUST

CLAIMANTS

V.

PAINEWEBBER, INC., JOHN DAY, JERRY PAYNE, ARTHUR JAMES HUFF, BRUCE A. BURSEY, THOMAS P. HART, W. DAVID EAST AND DAVID L. ARNOLD

RESPONDENTS

CASE SUMMARY

The Statement of Claim was filed on June 13, 1989.

Irene Robbins and Bert Shepherd as trustees of the Claimant, alleged that through a series of fraudulent options trades during December, 1987 through March, 1988, Respondents caused the Trustees substantial losses. Claimants claimed that the trades were unauthorized; excessive in amount and frequency; were in securities that were unsuitable for Trustees' accounts and were made with unauthorized borrowings in trustees' names from PaineWebber, Inc.

Respondents acknowledged that the accounts at issue suffered significant and unfortunate losses during the period from December 1987 through February 1988 but denied all allegations of wrong doing with respect to Claimants' accounts. Respondents maintained that Claimants knowingly authorized and encouraged Respondent, John Day to handle the accounts in a discretionary manner and that all trades in Claimants' accounts were suitable. Respondents further denied that the transactions in Claimants' accounts were excessive or that they were made with unauthorized borrowings from PaineWebber, Inc.

RELIEF REQUESTED

Claimants requested an award in the amount of: $1,500,000.00 in compensatory damages, interest on $1,500,000.00 from the date of the Claim to the date of payment of the award; $10,000,000.00 in punitive damages, Attorneys' fees, Interest and Costs under the Alabama Securities Act for an amount equal to compensatory damages, plus costs and attorneys' fees and interest, under Sec. 8-6-19 of the Alabama Securities Act; Treble Damages or, in the alternative, for an amount equal to three times actual or compensatory damages, plus attorneys' fees and costs under RICO, 18 U.S.C. Sec. 1964(c).7. Claimants also requested an award to the Trustees personally for compensatory and punitive damages-emotional Pain and suffering in the amount of $1,000,000.00.

Respondents requested dismissal of all Claims including Claimants' Claims for Punitive Damages and Treble Damages under RICO.

AWARD

On July 23, 24 and 25, 1990, October 15, 16 and 17, 1990 and December 5, 6, 7, 18, 19 and 20, 1990, the undersigned arbitrators heard the controversy between the Parties as set forth in submissions to arbitration signed by the Claimants Irene Robbins and Bert Shepherd on July 12, 1989 and by Respondents, PaineWebber, Inc. on August 23, 1989, John Day on August 31,

1989, Jerry W. Payne on August 23, 1989, Arthur James Huff on August 31, 1989, Bruce A. Bursey on August 31, 1989, Thomas P. Hart, September 13, 1989 and W. David East on August 31, 1989. The hearing was held in Atlanta, Georgia and consisted of twenty two (22) sessions. The arbitration panel, having considered the pleadings, the testimony, and the evidence presented at the hearing has determined in full and final resolution of the issues submitted for determination as follows:

1. Respondents, Jerry Payne, Arthur James Huff, Bruce A. Bursey, Thomas P. Hart, W. David East and David L. Arnold are dismissed with prejudice from this action on the Panel's own motion;

2. Claimants' Claim for damages for emotional pain and suffering are dismissed with prejudice from this action on the Panel's own motion;

3. Respondents, PaineWebber, Inc. and John Day are jointly and severally liable to pay to Claimants, Irene Robbins and Bert Shepherd, Trustees, the sum of Three Hundred and Twenty Five Thousand Dollars and no Cents ($325,000.00) exclusive of interest;

4. Claimants' Claim for punitive damages shall be and hereby is denied;

5. Claimants' Claim for treble damages under RICO shall be and hereby is denied;

6. The Parties shall each bear their respective costs, including attorneys' fees;

7. Pursuant to Section 43 of the Code of Arbitration Procedure, the NASD, Inc. shall retain the $1,000.00 filing fee previously deposited by the Claimants;

8. Respondents, PaineWebber, Inc. and John Day are jointly and severally assessed forum fees in the amount of $21,000.00

payable to the NASD, Inc. through its staff administrator in accordance with Section 43 of the Code of Arbitration Procedure;

9. Respondents, PaineWebber, Inc. and John Day are Jointly and severally liable to pay to Claimants, Irene Robbins and Bert Shepherd an additional sum of $1,000.00 previously deposited by Claimants and retained by the NASD, Inc., in accordance with Section 43 of the Code of Arbitration Procedure.

ARBITRATORS CONCURRING

/s/_____
A. Keith Logue
(Public-Chairman)

/s/_____
Daniel E. Gulden
(Public-Panelist)

/s/_____
Thomas M. Johnson, Jr.
(Industry-Panelist)

DATED BY NASD
JANUARY 10, 1991

APPENDIX E
NASD v. PaineWebber Inc., et al.
No. C05910051

ALABAMA SECURITIES COMMISSION

770 WASHINGTON STREET, SUITE 570
MONTGOMERY, ALABAMA 36130-1201

TELEPHONE (205) 242-2984

The Alabama Securities commission has access to all dealer and agent records maintained by the National Association of Securities Dealers through its Central Registration Depository in Rockville, Maryland. The attached is a printout obtained by the Alabama Securities Commission staff from the Central Registration Depository computer.

Witness my hand and seal this 13th day of March, 1992.

/s/
Linda R. Pugh

Securities Registration Manager

B/D 8174 PAINEWEBBER INCORPORATED
STATUS X, ACTION DHS, ON 4/29/91, SOURCE NA, PROVISO
INCIDENT: 171, RECORD: 1.

1 CASE ID: C05910051 NEW-(828) FILED APRIL 29, 1991 BY DISTRICT
2 NO. 5 AGAINST RESPONDENTS PAINEWEBBER INCORPORATED, JOHN A.
3 DAY, JERRY W. PAYNE, DAVID L. ARNOLD AND WILLIAM D. EAST
4 ALLEGING VIOLATIONS OF ARTICLE III, SECTIONS 1, 2, 15, 18, 19
5 AND 27 OF THE RULES OF FAIR PRACTICE IN THAT RESPONDENT DAY
6 EXERCISED DISCRETIONARY POWER IN THE TRUST ACCOUNTS OF A PUBLIC
7 CUSTOMER WITHOUT PRIOR WRITTEN AUTHORIZATION BY THE TRUSTEES OF
8 THE ACCOUNTS AND PRIOR WRITTEN ACCEPTANCE OF THE ACCOUNTS AS
9 DISCRETIONARY BY HIS MEMBER FIRM; EXECUTED SIX UNAUTHORIZED
10 OPTIONS TRANSACTIONS IN THE TRUST ACCOUNTS; RECOMMENDED AND
11 ENGAGED IN OPTIONS PURCHASE AND SALE TRANSACTIONS IN THE SAME
12 TRUST ACCOUNTS WITHOUT HAVING REASONABLE GROUNDS FOR BELIEVING

Do you want to see more?

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B/D 8174 PAINEWEBBER INCORPORATED
STATUS X, ACTION DHS, ON 4/29/91, SOURCE NA, PROVISO
INCIDENT: 171, RECORD: 1

1 THAT THESE RECOMMENDATIONS AND RESULTANT TRANSACTIONS WERE
2 SUITABLE BASED ON THE CUSTOMER'S FINANCIAL SITUATION,
3 OBJECTIVES AND NEEDS; RESPONDENT DAY, ASSISTED BY RESPONDENTS
4 ARNOLD AND EAST, ENGAGED IN A SCHEME TO DEFRAUD THE SAME PUBLIC
5 CUSTOMER ACCOUNTS IN THAT HE EXECUTED BLOCK PURCHASES OF
6 OPTIONS THAT WERE FINANCED BY PERSONAL LOANS FROM TWO PUBLIC
7 CUSTOMERS AND ALLOCATED PROFITABLE TRANSACTIONS TO THEIR
8 PERSONAL ACCOUNTS WHILE ALLOCATING THE UNPROFITABLE
9 TRANSACTIONS TO THE ACCOUNTS OF THE CUSTOMER, ALL WITHOUT
10 DISCLOSING THIS ACTIVITY TO RESPONDENT MEMBER; RESPONDENTS DAY,
11 ARNOLD AND PAYNE FAILED TO RESPOND TO NASD REQUESTS OR
12 INFORMATION MADE PURSUANT TO ARTICLE IV, SECTION 5 OF THE RULES

Do you want to see more?

[Page Number 0] <Pg-Up> <End>> <Ctrl-PrtSc> <esc> <Alt-P>

B/D 8174 PAINEWEBBER INCORPORATED
STATUS X, ACTION DHS, ON 4/29/91, SOURCE NA, PROVISO
INCIDENT: 171, RECORD: 1

1 OF FAIR PRACTICE; RESPONDENT MEMBER, ACTING THROUGH RESPONDENT
2 PAYNE FAILED TO ESTABLISH, MAINTAIN AND/OR ENFORCE WRITTEN

3 SUPERVISORY PROCEDURES; AND, FAILED TO SUPERVISE REASONABLY AND
4 PROPERLY RESPONDENTS DAY, ARNOLD AND EAST.

Do you want to see more?

BEFORE THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
DISTRICT BUSINESS CONDUCT COMMITTEE NO. 5

District Business Conduct Committee
for District No. 5

COMPLAINANT

v.

PaineWebber Incorporated - MEMBER
(CRD No. 8174)
1285 Avenue of the Americas
New York New York 10019

and

John A. Day, Registered General
Securities Representative
(CRD No. 1179685)
686 Idlewilde Circle
Birmingham, Alabama 35205

and

Jerry W. Payne, Branch Manager
and
Registered General Securities
Principal
(CRD No. 821139)
8308 Championship Drive, #304
Germantown, Tennessee 38138

and

David L. Arnold, Registered General
Securities Representative
(CRD No. 1642382)
45 W. Montcrest Drive

DECISION
AND
ORDER OF ACCEPTANCE
OF
OFFER OF SETTLEMENT

AMENDED COMPLAINT

CASE NO. C05910051

April 24, 1992

Birmingham, Alabama 35213

and

William D. East, Registered General
Securities Representative
(CRD No. 1020766)
3003 Warrington Road
Birmingham, Alabama 35223

RESPONDENTS

Amended Compliant No. NEW-828 was issued by the District Business Conduct Committee for District No. 5 (herein "the Committee") of the National Association of Securities Dealers, Inc., on February 21, 1992.

Amended Complaint No. NEW-828 names as Respondents member firm PaineWebber Incorporated, John A. Day, Registered General Securities Representative., Jerry W. Payne, Branch Manager and Registered General Securities Principal, David L. Arnold, Registered General Securities Representative, and William D. East, Registered General Securities Representative.

Respondent Member PaineWebber Incorporated and individual Respondents John A. Day, Jerry W. Payne, David L. Arnold, and William D. East have submitted Offers of Settlement. Under terms of the Offers, Respondents waive their right to a hearing before the District Business Conduct Committee, agree to findings by the District Business Conduct Committee of certain rule violations as noted hereinafter, and agree to certain findings of fact based on the allegations of the Amended Complaint, without admitting or denying the truth thereof.

Respondents also waive their right to appeal to the Board of Governors of the Association and to the Securities and Exchange Commission pursuant to Section 19(d) of the Securities Exchange Act of 1934 and Rule 19(d) thereunder, and to judicial review by any United States Court of Appeals, or to otherwise challenge or contest the validity of the Order issued if the Offers of Settlement

are accepted. Additionally, Respondents propose and consent to the imposition by the District Business Conduct Committee of the sanctions hereinafter noted.

BACKGROUND

Respondent Member PaineWebber Incorporated, during all periods mentioned herein, was a registered broker/dealer with the Securities and Exchange Commission and a member of the Association, which registration and membership remain currently in effect.

Individual Respondent John A. Day, during all periods mentioned herein, was associated with the Birmingham, Alabama branch office of Respondent Member PaineWebber Incorporated, and was registered with the Association under Article IV of the Association's By-Laws as a General Securities Representative, which registration remains currently in effect.

Individual Respondent Jerry W. Payne, during all periods mentioned herein, was the manager of the Birmingham, Alabama branch office of Respondent Member PaineWebber Incorporated, and was registered with the Association under Article IV of the Association's By-Laws as a General Securities Principal, which registration remains currently in effect.

Individual Respondent David L. Arnold, during all periods mentioned herein, was associated with the Birmingham, Alabama branch office of Respondent Member PaineWebber Incorporated, and was registered with the Association under Article IV of the Association's By-Laws as a General Securities Representative, which registration remains currently in effect.

Individual Respondent William D. East, during all periods mentioned herein, was associated with the Birmingham, Alabama branch office of Respondent Member PaineWebber Incorporated, and was registered with the Association under Article IV of the Association's By-Laws as a General Securities Representative, which registration remains currently in effect.

SUMMARY OF AMENDED COMPLAINT

The First Cause of Amended Complaint alleges violations of Article III, Sections 1 and 15 of the Association's Rules of Fair Practice by individual Respondent John A. Day in that during the period from on or about November 30, 1987, through on or about February 2, 1988, individual Respondent Day exercised discretionary power in the public customer accounts of the Davis Robbins Marital Trust, account no. SQ-17994-08, and the Davis Robbins Family Trust, account no. SQ-17986-08, without prior written authorization from the trustees of these trust accounts, and prior written acceptance of the subject accounts as discretionary by Respondent Member PaineWebber Incorporated.

The Second Cause of Amended Complaint alleges violations of Article III, Section 1 of the Association's Rules of Fair Practice by individual Respondent John A. Day in that during the period from on or about February 23, 1988 through on or about March 2, 1988, individual Respondent Day executed six unauthorized options transactions in the public customer accounts of the Davis Robbins Marital Trust, account no. SQ-17994-08, and the Davis Robbins Family Trust, account no. SQ-17986-08.

The Third Cause of Amended Complaint alleges violations of Article III, Sections 1 and 2 of the Association's Rules of Fair Practice by individual Respondent John A. Day in that during the period from on or about November 30, 1987, through on or about March 2, 1988, individual Respondent Day recommended and engaged in options purchase and sale transactions in the public customer accounts of the Davis Robbins Marital Trust, account no. SQ-17994-08, and the Davis Robbins Family Trust, account no. SQ-17986-08, and did not have reasonable grounds for believing that these recommendations and resultant transactions were suitable for the customers, on the basis of their financial situation, objectives, and needs.

The Fourth Cause of Amended Complaint alleges violations of Article III, Section 1 of the Association's Rules of Fair Practice by individual Respondents John A. Day, David L. Arnold, and William

D. East, in that during the period from on or about January 4, 1988, through on or about March 2, 1988, individual Respondent Day failed and neglected to execute trades in a timely fashion in certain public customer accounts. Specifically, individual Respondent Day entered block transactions with Respondent Member PaineWebber's trading desk, but failed in some instances to promptly provide his branch office with order allocation tickets. By doing so, individual Respondent Day prevented his employer member firm PaineWebber from accurately determining the sequence of the block transactions.

In addition, individual Respondents Arnold and East obtained personal loans from two public customers of Respondent Arnold, OV, account no. SQ-17505-16, and HG, account no. SQ-17573-16, through two corporate entities, Birmingham Hide and Tallow Company, account no. SQ-17507-16, and Alabama Grease Products, controlled by OV and HG, respectively. Respondents Day, Arnold, and East used these monies to finance certain block order option transactions that individual Respondent Day executed for their accounts.

In connection with these activities, individual Respondents Day and East shared equally the profits and losses attributable to certain Standard & Poor's 100 Index Option trades executed by individual Respondent Day for the account of individual Respondent William D. East, account no. SQ-90019-04. As a result of such trades, individual Respondent East, during the period from on or about January 15, 1988, through on or about February 26, 1988, paid individual Respondent Day a total of $26,289.12.

Individual Respondents Arnold and East failed and neglected to disclose to Respondent Member PaineWebber Incorporated that they had obtained personal loans from two clients of individual Respondent Arnold to finance certain of these block transactions. In addition, individual Respondents Day and East failed and neglected to disclose to Respondent Member PaineWebber Incorporated that individual Respondent East was sharing the profits in his account with individual Respondent Day.

The Fifth Cause of Amended Complaint alleges violations of

Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice by individual Respondent John A. Day, in that during the period from on or about June 8, 1990, to the present, individual Respondent Day failed and neglected to timely respond to the Association's requests for information, made pursuant to Article IV, Section 5 of the Association's Rules of Fair Practice, in letters dated May 29, 1990, and July 12, 1990, concerning the activity detailed in the First, Second, Third, and Fourth Causes of Complaint

The Sixth Cause of Amended Complaint alleges violations of Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice by individual Respondent David L. Arnold, in that during the period from on or about October 17, 1990, to the present, individual Respondent Arnold failed and neglected to timely respond to the Association's requests for information, made pursuant to Article IV, Section 5 of the Association's Rules of Fair Practice, in letters dated October 3, 1990, and December 4, 1990, concerning the activity detailed in the Fourth Cause of Complaint.

The Seventh Cause of Amended Complaint alleges violations of Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice by individual Respondent Jerry W. Payne, in that during the period from on or about October 17, 1990, to the present, individual Respondent Payne failed and neglected to timely respond to the Association's requests for information, made pursuant to Article IV, Section 5 of the Association's Rules of Fair Practice, in letters dated October 3, 1990, and December 4, 1990, concerning the activity detailed in the Fourth Cause of Complaint.

The Eighth Cause of Amended Complaint alleges violations of Article III, Sections 1 and 27 of the Association's Rules of Fair Practice by Respondent Member PaineWebber Incorporated, and individual Respondent Jerry W. Payne, in that Respondent Member PaineWebber Incorporated, acting through individual Respondent Jerry W. Payne, failed and neglected to establish, maintain, and/or enforce written supervisory procedures which would enable then to exercise reasonable and proper supervision of individual Respondents John A. Day, David L. Arnold, and William D. East, and failed and neglected to supervise reasonably and properly individual

Respondents John A. Day, David L. Arnold, and William D. East, in connection with the violative activity detailed in the Third and Fourth Causes of Complaint.

FACTS, FINDINGS, AND CONCLUSIONS

We have reviewed the Amended Complaint, the Answers, the material accumulated during the course of the staff's investigation, and the Offers of Settlement. We believe that it is proper to accept the offers of Settlement.

Given the extent and the egregious nature of individual Respondent John A. Day's misconduct, we deem it appropriate to impose these severe sanctions. Day's mishandling of the two trust accounts exhibited conduct which cannot be tolerated. He took advantage of his fiduciary relationship and the confidence placed in him by the beneficial owners of the accounts. His failure to provide his employer member firm with accurate documentation of the block order allocation transactions prevented Respondent Member PaineWebber Incorporated and its branch manager from properly monitoring the activity in the trust accounts and further prevented any possible efforts to limit the detrimental effects of his trading strategy. Day's actions also hindered both the Association and the member firm from accurately determining the sequence of transactions.

We hold Respondent Member PaineWebber Incorporated and individual Respondent Jerry W. Payne responsible for their failure to closely monitor Day's activities and for failing to have instituted appropriate procedures which would have prevented Day's activities from going undetected. We recognize the fact that Respondent Member PaineWebber Incorporated has instituted new procedures for the purpose of preventing this type of activity in the future. The procedures call for the review of all block order transactions by the Compliance Department of Respondent Member PaineWebber Incorporated on a daily basis and explanations are requested of branch office managers for any trade that has not been allocated within forty minutes of notification of execution. Additionally, violations of these procedures are enforced by the cancellation of commissions and/or suspension of block trading privileges. Further,

whenever an employee or employee-related transaction is combined with a public customer order, the number of shares being purchased or sold for the employee or the employee-related account must be relayed to the block order desk at the time of the transaction.

The sanctioning of individual Respondent Jerry W. Payne is appropriate in that his role as Branch Office Manager afforded him direct contact with respondent Day and therefore the opportunity to observe his violative conduct. However, in mitigation, we note that individual Respondent Payne did take steps to review individual Respondent Day's activities, albeit after the majority of the transactions had occurred, with senior officials of Respondent Member PaineWebber Incorporated. The Committee took note of Payne's argument that Day's violative conduct occurred during a relatively short period of time not affording him time to take adequate supervisory measures. We find the sanctions against individual Respondents David L. Arnold and William D. East to be appropriate in that their failure to keep their employer member firm fully advised as to their activities prevented the member firm from effectively performing its supervisory duties. Finally, in reviewing the failure of individual Respondents Day, Payne, and Arnold to timely respond to the Association's request for information, the Committee took into consideration that while the individual Respondents did not directly respond to the requests, they did so on the advice of counsel and the information was provided to the staff in the form of sworn depositions and sworn testimony from related arbitration proceedings.

Individual Respondents Day, Payne, Arnold and East have not previously been the subject of a formal disciplinary action by the Association.

Based on these facts, we conclude that the sanctions imposed by our acceptance of the Offers of Settlement are in the public interest, are sufficiently remedial under the circumstances, and represent a proper discharge by the Association of its regulatory responsibilities under the Securities Exchange Act of 1934.

Accordingly, the District Business Conduct Committee for

District No. 5, after careful review and consideration of all matters pertinent to the Amended Complaint, finds that:

Respondent Member PaineWebber Incorporated did violate Article III, Sections 1 and 27 of the Association's Rules of Fair Practice, as alleged in the Eighth Cause of Amended Complaint.

Individual Respondent John A. Day did violate Article III, Sections 1,2 and 15, ad Article IV, Section 5 of the Association's Rules of Fair Practice, as alleged in the First, Second, Third, Fourth, and Fifth Causes of Amended Complaint.

Individual Respondent Jerry W. Payne did violate Article III, Sections 1 and 27, and Article IV, Section 5 of the Association's Rules of Fair Practice, as alleged in the Seventh and Eighth Causes of Amended Complaint.

Individual Respondent David L. Arnold did violate Article III, Section 1 and Article IV, Section 5 of the Association's Rules of Fair Practice, as alleged in the Fourth and Sixth Causes of Amended Complaint.

Individual Respondent William D. East did violate Article III, Section 1 of the Association's Rules of Fair Practice, as alleged in the Fourth Cause of Amended Complaint

SANCTIONS.

Based on the foregoing, it is the decision and order of this Committee that, pursuant to Article V, Section 1 of the Association's Rules of Fair Practice, the following sanctions be imposed:

Respondent Member PaineWebber Incorporated is censured and fined $75,000.00;

Individual Respondent John A. Day is censured, fined $100,000.00, and barred from association with any member of the Association in any capacity. The fine collection efforts by the Association shall be suspended unless and until individual

Respondent John A. Day seeks to again become associated with an NASD member in any capacity. Payment of the fine shall be a prerequisite for any application by individual Respondent John A. Day for association with a member;

Individual Respondent Jerry W. Payne is censured, fined $10,000.00, and required to requalify as a General Securities Principal by taking and passing the Series 24 examination within ninety (90) days of the acceptance of this Offer of Settlement by the District Business Conduct Committee and the National Business Conduct Committee. Further, individual Respondent Jerry W. Payne is barred from association with any member of the Association in the capacity of a Compliance Registered Options Principal and/or Senior Registered Options Principal;

Individual Respondent David L. Arnold is censured, fined $5,000.00, and suspended for six months from association with any member of the Association, said suspension to commence on a date set by the Association; and

Individual Respondent William D. East is censured and fined $15,000.00.

DISTRICT BUSINESS
CONDUCT
COMMITTEE FOR
DISTRICT NO. 5

By: Warren A. Butler, Jr.
District Director

APPENDIX F
Letter, November 29, 1990
PaineWebber's Counsel to NASD
Acknowledging Engagement of Counsel

November 29, 1990

BY FACSIMILE and FIRST CLASS MAIL

Ms. June Riley
National Association of Securities Dealers, Inc.
NASD Financial Center - Eighth Floor
33 Whitehall Street
New York, New York 10004

Re: Irene Robbins, et al. vs. PaineWebber Incorporated, et al.
NASD Arbitration No. 89-01737

Dear Ms. Riley:

On Monday, November 26, 1990, I received Claimant's request for an Order of Appearance requiring PaineWebber to produce numerous additional documents at the time of the next hearing session. During the pre-hearing conference which was last held last Tuesday, November 20, 1990, Mr. Johnson declined to consider Mr. Eubank's requests for such orders (since none of the parties or the arbitrators had yet received them), and indicated that another telephone conference might be necessary to resolve that issue. I have tried several times to reach you by telephone in order to request an opportunity to be heard with respect to those requests, to which we have several objections. Last evening, Mr. Eubank informed me that Mr. Logue has issued the Order of Appearance without allowing us an opportunity to respond.

In any event, I would respectfully request that we have a very brief telephone conference with Mr. Logue either today or tomorrow, with as many of the lawyers as possible, in order to allow the Respondents to voice any objections they may have. I would also ask that this letter be treated as PaineWebber's request for reconsid-

eration of the Order of Appearance which has apparently been entered.

We would offer the following responses to the document requests made by Mr. Eubank:

1. Broadly read, this request would require PaineWebber to produce every order ticket and wire sent to or received by the Birmingham, Alabama office for a four-month period of time. Compliance with that request would not only be extremely burdensome, but it would also require the production of documents which have little, if any, relevance to these proceedings.

Our position with respect to the processing of allocation tickets is simply that it is not possible to ascertain, from looking at the time stamps on the tickets, exactly when John Day filled those tickets out or turned those tickets in to the cage area. We do not contend that John Day was always prompt in taking his tickets to the wire operators; to the contrary, we know he was sometimes delinquent in doing so. Nevertheless, although some of the delays between execution wires and allocation wires may have been caused by Mr. Day's failure to immediately take the allocation tickets to the cage, that fact still does not tell us when Mr. Day assigned account numbers to those trades. It is our firm belief that the trades were placed for specific accounts at the time Mr. Day first called them in to the desk. To the extent Mr. Day was tardy in taking his allocation tickets to the cage, we believe the evidence will demonstrate that Mr. Day was simply busy and/or sloppy in processing his paperwork.

Likewise, there is little doubt that some of the delays were caused by the fact that these allocation tickets were not a high priority task for the wire operators in the Birmingham office. The four people who served as wire operators during this period of time were busy, not only transmitting and receiving wires, but performing other duties as well. The testimony of those wire operators--which is forthcoming next week--will shed a great deal of light on this issue. My point is simply that counting the number of tickets and wires sent and received by the Birmingham office during a four-

month period of time will not shed any additional light on these issues.

Finally, we have an overriding concern with respect to producing documents that will disclose to Mr. Eubank the names of every other customer of PaineWebber during that period of time. Mr. Eubank has already gone to extraordinary lengths to cause PaineWebber as much adverse publicity as possible. Under the circumstances of this case, we have every reason to be concerned that Mr. Eubank would contact other PaineWebber customers and, possibly, disclose confidential information regarding those customers to third parties. PaineWebber's customers have every right to expect that their names and financial matters will be maintained in the strictest confidence. As a result, we respectfully request that we not be required to turn those names over to Mr. Eubank.

2. If I interpret this request correctly, it asks that we provide Mr. Eubank with all order tickets and associated wires pertaining to block trades of S&P 100 index options by the Birmingham office during December 1987 through March 1988. We will make every effort to bring those documents with us to the hearing. However, for the same reasons expressed above, we would urge the panel to allow us to redact the names and account numbers of the customers disclosed on those tickets and wires.

3. PaineWebber readily acknowledges that it has provided independent counsel for Mr. East, Mr. Arnold, Mr. Day and Mr. Payne. However, the amounts paid to those attorneys for their efforts on behalf of those Respondents is entirely irrelevant and immaterial to any issue in this case. Indeed, the federal court declined to require PaineWebber to produce this information, prior to referring this case to arbitration. We would respectfully request that the panel reconsider this aspect of its Order of Appearance.

4. We are making every effort to comply with this request. I should note, in addition, that all originals of the allocation tickets are available, and have been available to Mr. Eubank for his review at any time.

5. PaineWebber will make every attempt to comply with this request, if possible. Once again, however, we would request that we be allowed to redact the names and account numbers of any customer who is not involved in this [*sic*] proceedings.

Although I have yet to see a copy of Mr. Logue's order requiring PaineWebber to bring these documents to the hearing next week, I would respectfully request that you telecopy this response to him immediately with a request that he schedule a very brief conference call as quickly as possible. I am having a copy of this letter sent by telecopy to counsel for the remaining parties, in order to avoid any delay in scheduling that conference.

As always, I greatly appreciate your assistance.

Very truly yours,

A. Inge Selden III

AISIII/mpw

cc: Robert Eubank, Esq. (By Hand Delivery)
Romaine L. Gardner, Esq. (By Telecopy)
F. Timothy McAbee, Esq. (By Telecopy)
J, Mark White, Esq. (By Telecopy)
Lee H. Zell, Esq. (By Telecopy)
John P. Scott, Esq. (By Telecopy)

APPENDIX G
Opinion and Order, Nelson, J.
Robbins, et al. v. Vickers, et al.
U.S.D.C. N.D.Ala. No. 89-N-0613-S (4/9/90)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN-DIVISION

IRENE ROBBINS and BERT SHEPHERD Trustees of the Davis Robbins Family Trust and the Davis Robbins Marital Trust,	)	
Plaintiffs,	)	CV-89-N-0613-S
vs	)	
OWEN VICKERS, HARVEY GOTLIEB, ALABAMA GREASE PRODUCTS COMPANY AND BIRMINGHAM HIDE AND TALLOW COMPANY,	)	
Defendants.	)	

OPINION AND ORDER

This cause is presently before the court on a motion of W. David East to "Quash Deposition Subpoena and to Stay Discovery," filed March 16, 1990; a motion of David L. Arnold to "Quash Subpoena for Deposition and Production of Documents and for Stay of Discovery of David L. Arnold," filed March 16, 1990; a motion of Roland L. Day for a protective order, filed March 29, 1990; "Trustees' Motion to Compel Compliance with Subpoenas Duces Tecum," filed March 29, 1990; and a "Motion to Compel, and Opposition to Roland L Day's Motion for Protective Order," filed by the plaintiffs on April 5, 1990.

David L. Arnold and W. David East are defendants in a pending criminal proceeding in state court, in which they stand accused of wrongdoing in connection with investment accounts maintained at

PaineWebber, Inc. during the period of time from November, 1987 to March, 1988. This civil action arises out of the same alleged acts of wrongdoing, however, Arnold and East have been dismissed as defendants in this action and the claims against them have been referred to arbitration. Arnold and East now seek to avoid testifying in this civil action by invoking their Fifth Amendment right against self-incrimination. The plaintiffs claim Arnold and East waived their Fifth Amendment privilege when they were deposed and testified in two companion cases, civil actions 88-G-0978-S and 88-G-1016-S. Those depositions were taken prior to the indictment of Arnold and East in the criminal matter.

Deposition testimony taken in an earlier proceeding may be used in a later proceeding, and the depositions may be suppressed under the Fifth Amendment only if some impropriety in the taking of the depositions may be imputed to the government. *United States v. Handley*, 763 F.2d 1401, 1405 (11th Cir. 1985), *reh. denied en banc*, 770 F.2d 1084, *cert. denied*, 474 U.S. 951 (1985). Presumably, the same or a similar rule is applicable where the second proceeding is civil instead of criminal. No impropriety is alleged here and none appears from the record. Therefore the deposition testimony of Arnold and East taken in the earlier proceedings may be used in this proceeding to the extent the rules of evidence permit.

The more important question presented here is whether Arnold and East, by testifying in the earlier proceeding, have waived the right to invoke the Fifth Amendment privilege against testifying in this proceeding. The court concludes they have not generally waived the privilege. Certainly they have not waived the privilege as to matters not covered in the earlier testimony. As to matters covered in their earlier depositions, East and Arnold cannot be compelled to "disclose the details"[1] regarding any incriminating matters to which they then testified. The Eleventh Circuit has held a witness may be compelled to "disclose the details" only in the same proceeding "where the initial 'criminating facts have been voluntarily revealed.'" *United States v. Fortin*, 685 F.2d 1297 (11th Cir. 1982) *(citations omitted)*. Thus, Arnold and East may invoke their

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[1] *Rogers v. United States*, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951).

Fifth Amendment privilege in this action.

Notwithstanding the fact that Arnold and East retain the right to assert their Fifth Amendment privileges, they are not entitled to a blanket assertion of the right. The Fifth Amendment privilege against compulsory self-incrimination must be claimed with respect to particular questions. A blanket refusal to answer all questions is unacceptable because it forces the reviewing court to speculate as to which questions would tend to incriminate the witness. *Anglada v. Sprague*, 822 F.2d 1035 (11th Cir. 1987). The plaintiffs will be allowed to depose Arnold and East, and they may claim the protection of the Fifth Amendment only as to questions which would tend to incriminate them and the subjects of which were not waived in the prior depositions.

Mr. Arnold's claim of a blanket Fifth Amendment privilege regarding the documents he has been requested to produce is equally untenable. The Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects, but not from compelled production of corporate documents which are in his possession in a representative capacity. *Bellis v. United States*, 417 U.S. 85, 87-89, 40 L.Ed.2d 678, 683-84, 94 S.Ct. 2179 (1974), *United States v. Centennial Builders*, 747 F.2d 678, 684 (11th Cir. 1984). Arnold must claim the privilege as to each individual document which he believes is protected by his Fifth Amendment privilege.

East and Arnold also object to the scope and nature of the document requests contained in the deposition subpoenas. The court notes the deposition subpoenas are not part of the record, and it therefore does not have the document requests before it. The motions are denied for that reason. Furthermore, it appears to the Court that these objections might well be amenable to resolution in whole or part by agreement of counsel. Should the parties continue to disagree regarding the scope of the subpoena requests, the party objecting to the discovery may move for a protective order at that time. Counsel are reminded that, should they seek the Court's intercession in their discovery matters, the Court may impose sanctions against the losing party in accordance with Fed.R.Civ.P. 37(a)(4),

in the absence of a substantial justification for the losing party's position.

Roland L. Day's motion for a protective order is based on the claim that plaintiff's action in which they named him as a defendant has been referred to arbitration. Similar claims were raised by Arnold, East, and John Day earlier in this action and were denied by a United States Magistrate for this court. Roland Day's motion is similarly due to be denied. Plaintiffs have shown in their motion that the discovery they seek regarding the time period in which John Day worked at Thomson McKinnon prior to October 1987, the matters relating to medical treatment of John Day, and allegations of substance abuse by John Day, is relevant to the subject matter involved in the pending action. Mr. Day's motion for a protective order is therefore due to be denied, and plaintiff's motion to compel is due to be granted.

Plaintiff's motion to compel PaineWebber to comply with the terms of the subpoena duces tecum of March 29, 1990 is due to be granted in accordance with the order entered by Judge Campbell in this action on November 29, 1989. The identification of the subjects to which the documents are related constitute a sufficient specification of the documents required to be produced under the subpoena.

Accordingly, it is hereby ORDERED,

(1) The motion to "Quash Deposition Subpoena and to Stay Discovery," filed March 16, 1990 by W. David East is DENIED.

(2) The motion of David L. Arnold to "Quash Subpoena for Deposition and Production of Documents and for Stay of Discovery of David L. Arnold," filed March 16, 1990 is DENIED.

(3) The motion of Roland L. Day for a protective order, filed March 29, 1990 is DENIED.

(4) The "Motion to Compel and Opposition to Roland L. Day's Motion for Protective Order," filed by the plaintiffs on April 5,

1990 is GRANTED.

(5) The "Trustees' Motion to Compel Compliance with Subpoenas Duces Tecum," filed March 29, 1990, is GRANTED.

Done, this 9th of April, 1990.

/s/ Edwin L. Nelson
EDWIN L NELSON
UNITED STATES DISTRICT JUDGE

APPENDIX H
Constitutional Provisions, Statutes and Regulations

Alabama [Uniform] Securities Act

§ 8-6-17 [Uniform Securities Act §101]. Prohibited acts regarding offer, sale or purchase of securities.

(a) It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly, to:

(1) Employ any device, scheme or artifice to defraud;

(2) Make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or

(3) Engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

§ 8-6-19 [Uniform Securities Act §410]. Civil liabilities of sellers, agents, etc.; remedies of purchasers.

(a) Any person who:

(1) Sells or offers to sell a security in violation of any provision of this article or of any rule or order imposed under this article or of any condition imposed under this article, or

(2) Sells or offers to sell a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of the untruth or omission,

is liable to the person buying the security from him who may bring an action to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, court costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security.

Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

(c) Every person who directly or indirectly controls a person liable under subsections (a) or (b) of this section, including every partner, officer or director of such a person, every person occupying a similar status or performing similar functions, every employee of such a person who materially aids in the conduct giving rise to the liability, and every dealer or agent who materially aids in such conduct is also liable jointly and severally with and to the same extent as the person liable under subsection (a) or (b), unless he is able to sustain the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(h) Any condition, stipulation, or provision binding any person acquiring any security or receiving any investment advice to waive compliance with any provision of this article or any rule or order hereunder is void.

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Arbitration Act

9 U.S.C. §10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. §1961. Definitions.

As used in this chapter -

(1) ***"racketeering activity" means*** (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to armed robbery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from

interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), ***section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)***, sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1954 (relating to engaging in monetary transactions in property derived from specified unlawful activity) sections 2251 through 2252 (relating to sexual exploitation of children),, section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, ***fraud in the sale of securities***, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable

under the Currency and Foreign Transactions Reporting Act.

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) ***"person" includes any individual or entity*** capable of holding a legal or beneficial interest in property;

(4) ***"enterprise" includes*** any individual, partnership, corporation, association, or other legal entity, and ***any union or group of individuals associated in fact although not a legal entity***;

(5) ***"pattern of racketeering activity"*** requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity ...

18 U.S.C. §1962. Prohibited activities.

(b) It shall be ***unlawful for any person through a pattern of racketeering activity*** or through collection of an unlawful debt ***to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce***.

(c) It shall be ***unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity*** or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1964. Civil remedies.

(c) ***Any person injured in his business or property by reason of a violation of section 1962 of this title may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.***

Securities Act of 1933

Sec. 12 [15 U.S.C. §77l]. Civil liabilities arising in connection with prospectuses and communications. Any person who-

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission,), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Sec. 14. [15 U.S.C. §77n] Contrary stipulations void. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

Sec. 15. [15 U.S.C. §77o] Liability of controlling persons. Every person who by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11, or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, un-

less the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

Sec. 17. [15 U.S.C. §77q] Fraudulent interstate transactions. (a). It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly-

(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction. practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Sec. 18. [15 U.S.C. §77r] State control of securities. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

Securities Exchange Act of 1934

Sec. 10. [15 U.S.C. §78j] Regulation of the use of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5. Employment of manipulative and deceptive devices. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Sec. 20. [15 U.S.C. §78t] Liabilities of controlling persons. (a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

Sec. 28. [15 U.S.C. §78bb] Effect on existing law. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity, but no person permitted to maintain a suit for damages under this title shall recover, through satisfaction of a judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts, or the operation of "bucket shops" or other similar or related activities, shall invalidate any put, call, straddle, option, privilege, or other se-

curity, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations of a self-regulatory organization that are filed with the Commission pursuant to section 19(b) of this Act.

Sec. 29. [15 U.S.C. §78cc] Validity of contracts. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

APPENDIX I
State Securities Acts
(Including District of Columbia and Puerto Rico)

State	Uniform Act?	Rescission?	Attorney's Fees?	Interest?
AL	Y	8-6-19(a)	8-6-19(a)	8-6-19(a)
AK	Y	45.55.220(a)	45.55.220(a)	45.55.220(a)
AZ		44-2001	44-2001	44-2001
AR	Y	23-42-106(a)(1)	23-42-106(a)(1)	23-42-106(a)(1)
CA		25501		25501
CO	Y	11-51-604	11-51-604	11-51-604
CT	Y	36-498(a)	36-498(a)	36-498(a)
DE	Y	7323(a)(2)	7323(a)(2)	7223(a)(2)
DC	Y	2-2613(a)	2-2613(a)	2-2613(a)
FL	Y	517.211(1)	517.211(6) ?	517.211(3)(a)
GA	Y	10-5-14(a)	10-5-14(a)	10-5-14(a)
HI	Y	485-20(a)	485-20(a)	485-20(a)
ID	Y	30-1446(1)	30-1446((1)	30-1446(1)
IL		13[137.13](A)	13[137.13](A)	13[137.13](A)
IN	Y	23-2-1-19(a)	23-2-1-19(a)	23-2-1-19(a)
IA	Y	502.502(2)	502.502(2)	502.502(2)
KS	Y	17-1268(a)	17-1268(a)	17-1268(a)
KY	Y	292.480(1)	292.480(1)	292.480(1)
LA		51:714(a)	51:714(a)	51:714(a)
ME		10605(1)	10605(1)	10605(1)
MD	Y	11-703(b)	11-703(b)	11-703(b)
MA	Y	410(a)(2)	410(a)(2)	410(a)(2)
MI	Y	451.810(e)		451.810(e)
MN	Y	80A.23(2)	80A.23(2)	80A.23(2)
MS	Y	75-71-717(a)	75-71-717(a)	75-71-717(a)
MO	Y	409.411(a)(2)	409.411(a)(2)	409.411(a)(2)
MT	Y	30-10-307(1)	30-10-307(1)	30-10-307(1)
NE	Y	8-1118(1)	8-1118(1)	8-1118(1)
NV	Y	90.660(1)	90.660(1)	90.660(1)
NH	Y	421-B:25(I)	425-B:25(I)	425-B:25(I)
NJ	Y	49:3-71(2)		49:3-71(2)

State	Uniform Act?	Rescission?	Attorney's Fees?	Interest?
NM	Y	58-13B-40(C)	58-13B-40(C)	58-13B-40(C)
NY				
NC	Y	78A-56(a)(2)	78A-56(a)(2)	78A-56(a)(2)
ND		10/4/17	10/14/07	10/4/17
OH		1707.43		
OK	Y	408 (a)(2)(A)	408 (a)(2)(A)	408 (a)(2)(A)
OR	Y	59.115(2)(a)	59.115(2)(a)	59.115(2)(a)
PA	Y	501[70P.S. 1-501](a)		501[70P.S. 1-501](a)
PR	Y	890(a)(2)	890(a)(2)	890(a)(2)
RI	Y	7-11-605(a)	7-11-605(a)	7-11-605(a)
SC	Y	35-1-1490	35-1-1490	35-1-1490
SD	Y	47-31A-410(a)	47-31A-410(a)	47-31A-410(a)
TN	Y	48-2-122(a)(1)(B)		48-2-122(a)(1)(B)
TX		33 [581-33](A)(2)	33 [581-33](D)(7)?	33 [581-33](D)(1)
UT	Y	61-1-22(1)(b)	61-1-22(1)(b)	61-1-22(1)(b)
VT		4240(a)	4240(a)	4240(a)
VA	Y	13.1-522(A)	13.1-522(A)	13.1-522(A)
WA	Y	21.20.430(1)	21.20.430(1)	21.20.430(1)
WV	Y	32-4-410 (a)(2)	32-4-410 (a)(2)	32-4-410 (a)(2)
WI	Y	551.59(1)(a)	551.59(1)(a)	551.59(1)(a)
WY	Y	17-4-122(a)(ii)	17-4-122(a)(ii)	17-4-122(a)(ii)
52	42	51	45	50